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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF KANSAS.**

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**REPORTER:**  
**OSCAR LEOPOLD MOORE.**

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DURING THE PERIOD COVERED BY THIS VOLUME.

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The Supreme Court meets for the hearing of causes in every month except August and September, each session beginning on the first Monday of the month, except the January and July sessions, which begin on the first Tuesday of the month.

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HON. MAHLON PITNEY, Associate Justice.

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| FRANK L. CAMPBELL, Clerk†.....              | Topeka, Kan.      |

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The terms of the DISTRICT COURT are held as follows:

**FIRST DIVISION:** At *Topeka*, on the second Monday of April; at *Leavenworth*, on the second Monday of October; at *Kansas City*, on the second Monday of January and the first Monday of October (no jury in October); at *Salina* (by consent or special order), on the second Monday of May.

**SECOND DIVISION:** At *Wichita*, on the second Monday of March and the second Monday of September.

**THIRD DIVISION:** At *Fort Scott*, on the first Monday of May and the second Monday of November.

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\* Clerk's office, first division, at *Topeka*; second division, at *Wichita*; third division, at *Fort Scott*.

† Died February 9, 1918.

‡ Appointed February 16, 1918.

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See *Cones v. Gibson*, 77 Kan. 425.
- In re Lowe, Petitioner*, 54 Kan. 757.  
See *O'Neal v. Harrison*, 96 Kan. 339.
- Jones v. Marshall*, 8 Kan. App. 529.  
See *Godard v. Harbour*, 56 Kan. 748.
- Krapp v. Eldridge*, 33 Kan. 106.  
See *Stewart v. Price*, 64 Kan. 191.
- Lawrence v. Leidigh*, 58 Kan. 594.  
See *Cory v. Spencer*, 67 Kan. 648.
- Leavenson et al. v. Lafontaine*, 3 Kan. 523.  
See *Turner v. Crawford*, 14 Kan. 504.
- Lewis v. Barton*, 82 Kan. 163 (in part).  
See *Caspar v. Lewin*, 82 Kan. 604, 605.
- Madison v. Clippinger*, 74 Kan. 700 (in part).  
See *Caspar v. Lewin*, 82 Kan. 604, 605.
- Markin v. Priddy*, 39 Kan. 462.  
See *Markin v. Priddy*, 40 Kan. 689.
- Mellison v. Allen*, 80 Kan. 382 (in part).  
See *Stark v. Morgan*, 73 Kan. 453.
- Moore v. Annuity Association*, 93 Kan. 398 (in part).  
See *Moore v. Annuity Association*, 95 Kan. 591.
- National Bank v. Tufts*, 53 Kan. 710.  
See *Geiser v. Murray*, 84 Kan. 450, and  
*Paul v. Lingenfelter*, 89 Kan. 871.
- O'Meara v. McDaniel*, 49 Kan. 685 (in part).  
See *Bolinger v. Brake*, 57 Kan. 668.
- Penrose v. Cooper*, 86 Kan. 597 (in part).  
See *Penrose v. Cooper*, 88 Kan. 210.
- Rahm v. Bridge Manufactory*, 16 Kan. 277.  
See *Rahm v. Bridge Manufactory*, 16 Kan. 531.
- Railway Co. v. Brinkmeier*, 77 Kan. 14 (in part).  
See *Brinkmeier v. Railway Co.*, 81 Kan. 101.
- Railway Co. v. Kirkham*, 63 Kan. 255.  
See *Railroad Co. v. Lieurance*, 80 Kan. 424, citing  
*Railway Co. v. Frogley*, 75 Kan. 440.

- Railway Co. v. Lyan, 57 Kan. 635 (in part).  
See Collins v. Morris, 97 Kan. 264, 269.
- Railway Co. v. Merrill, 61 Kan. 671 (in part).  
See Railway Co. v. Merrill, 65 Kan. 436.
- Robertson v. Howard, 82 Kan. 588 (in part).  
See Robertson v. Howard, 83 Kan. 458.
- Russell v. The State, 11 Kan. 322.  
See Shellabarger v. Nafus, 15 Kan. 554.
- Scoffins v. Grandstaff, 12 Kan. 471.  
See Bolinger v. Brake, 57 Kan. 668.
- Sherman v. Luckhardt, 65 Kan. 610.  
See Sherman v. Luckhardt, 67 Kan. 682.
- Simmons v. Garrett, McCahon, 82, 1 Kan. [Dass. Ed.] 511.  
See Burchfield v. Haffey, 34 Kan. 43.
- Sims v. Daniels, 57 Kan. 552.  
See Miller v. Clark, 62 Kan. 279.
- Smith v. Smith, 67 Kan. 841 (in part).  
See Webster v. Broeker, 97 Kan. 219, 221.
- State v. Balch, 31 Kan. 465 (in part).  
See State v. Peterson, 102 Kan. 900.
- State v. Hall, 40 Kan. 338.  
See *In re* Flack, 88 Kan. 616.
- State v. Hickox, 64 Kan. 650.  
See Crigler v. Shepler, 79 Kan. 834.
- State v. Horne, 9 Kan. 131.  
See Shellabarger v. Nafus, 15 Kan. 554.
- State v. Lewis, 26 Kan. 123.  
See State v. Holmes, 98 Kan. 174.
- State v. Miller, 83 Kan. 410.  
See State v. Miller, 84 Kan. 667.
- State v. Reisner, 20 Kan. 548.  
See State v. McGillvray, 21 Kan. 680.
- State v. Shew, 8 Kan. App. 679.  
See State v. Mullins, 95 Kan. 280.
- State v. Snyder, 8 Kan. App. 686.  
See State v. Mullins, 95 Kan. 280.
- State v. Tennison, 42 Kan. 330 (in part).  
See State v. Peterson, 102 Kan. 900.
- Stewart v. Price, 64 Kan. 191.  
See Manley v. Park, 68 Kan. 400.
- Stigers v. Stigers, 5 Kan. 652.  
See Finley v. Funk, 35 Kan. 673.
- Thresher Co. v. Gruben, 6 Kan. App. 665 (in part).  
See Van Natta v. Snyder, 98 Kan. 102.
- Warner v. Broquet, 54 Kan. 649.  
See Nagle v. Tieperman, 74 Kan. 32.

- Watkins v. Glenn, 55 Kan. 417.  
See Beverly v. Barnitz, 55 Kan. 466.
- W. & W. Rld. Co. v. Kuhn, 38 Kan. 104.  
See W. & W. Rld. Co. v. Kuhn, 38 Kan. 675.
- Wesner v. O'Brien, 1 Kan. App. 416.  
See Wesner v. O'Brien, 56 Kan. 729.

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KANSAS CASES APPEALED TO THE SUPREME COURT  
OF THE UNITED STATES.

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AFFIRMED.

- Allen v. Riley, 71 Kan. 378.  
See Allen v. Riley, 203 U. S. 347.
- Bank v. Fritzlen, 75 Kan. 479.  
See Fritzlen v. Boatmen's Bank, 212 U. S. 364.
- Brandon v. Ard, 74 Kan. 424.  
See Brandon v. Ard, 211 U. S. 11.
- Bridge Company v. K. P. Rly. Co., 12 Kan. 409.  
See River Bridge Co. v. Kansas Pac. Ry. Co., 92 U. S. 815.
- Brinkmeier v. Railway Co., 81 Kan. 101.  
See Brinkmeier v. Mo. Pac. Rly. Co., 224 U. S. 268.
- Burnham v. Starkey, 41 Kan. 604.  
See Maddox v. Burnham, 156 U. S. 544.
- Caldwell v. Miller, 44 Kan. 12.  
See Hutchinson Investment Co. v. Caldwell, 152 U. S. 65.
- City of Kansas City v. Railway Co., 59 Kan. 427.  
See Clark v. Kansas City, 176 U. S. 114.
- C. K. & W. Rld. Co. v. Pontius, 52 Kan. 264.  
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- Clark v. Herington, 62 Kan. 866.  
See Clark v. Herington, 186 U. S. 206.
- Cole v. Railway Co., 97 Kan. 461.  
See A. T. & S. F. Rly. Co. v. Cole, 245 U. S. 641.
- Comm'rs of Franklin Co. v. Pennock, 18 Kan. 579.  
See Pennock v. Commissioners, 103 U. S. 44.
- G. R. I. & P. Rly. Co. v. McGlinn, 28 Kan. 274.  
See Chicago & Pacific Rly. Co. v. McGlinn, 114 U. S. 542.
- Dowell v. Railway Co., 83 Kan. 562.  
See Chi., R. I. & Pac. Ry. v. Dowell, 229 U. S. 102.
- Ft. L. Rld. Co. v. Lowe, *Sheriff*, 27 Kan. 749.  
See Fort Leavenworth Rld. Co. v. Lowe, 114 U. S. 525.
- Henley v. Meyers, 76 Kan. 723.  
See Henley v. Meyers, 215 U. S. 373.



- Hess v. Conway, 92 Kan. 787, 93 Kan. 246.  
See Holmes v. Conway, 241 U. S. 624.
- In re* Lowe, *Appellant*, 47 Kan. 769.  
See Lowe v. Kansas, 163 U. S. 81.
- In re* Williams, 79 Kan. 212.  
See Williams v. Walsh, 222 U. S. 415.
- K. P. Rly. Co. v. Dunmeyer, 24 Kan. 725.  
See Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629.
- K. P. Rly. Co. v. M. K. & T. Rly. Co., 15 Kan. 15.  
See Mo., etc., Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491.
- Larabee v. Railway Co., 74 Kan. 808.  
See Missouri Pacific Ry. v. Larabee Mills, 211 U. S. 612.
- Leavenworth v. Ewing, 80 Kan. 58.  
See Ewing v. City of Leavenworth, 226 U. S. 464.
- Libbey v. Clark, 25 Kan. 496.  
See Libbey v. Clark, 118 U. S. 250.
- Lusk v. Sessions, 95 Kan. 271.  
See Lusk v. Kansas, 240 U. S. 236.
- Manley v. Park, 62 Kan. 553.  
See Manley v. Park, 187 U. S. 547.
- Meffert v. Medical Board, 66 Kan. 710.  
See W. M. Meffert v. E. B. Packer *et al.*, 195 U. S. 625.
- Mitchell v. Comm'rs of Leavenworth, 9 Kan. 344.  
See Mitchell v. Commissioners, etc., 91 U. S. 206.
- M. K. & T. Rly. Co. v. Cook, 47 Kan. 216.  
See M. K. & T. Railway Co. v. Cook, 163 U. S. 491.
- M. K. & T. Rly. Co. v. Haber, 56 Kan. 694.  
See M. K. & T. Railway v. Haber, 169 U. S. 618.
- Mo. Pac. Rly. Co. v. Mackey, 33 Kan. 298.  
See Missouri Railway Co. v. Mackey, 127 U. S. 205.
- National Bank v. Ayers, 53 Kan. 463.  
See First National Bank v. Ayers, 160 U. S. 660.
- National Bank v. Robinson, 59 Kan. 777.  
See Farmers' National Bank v. Robinson, 176 U. S. 631.
- Railroad Co. v. Harris, 76 Kan. 255.  
See Union Pac. Rld. Co. v. Harris, 215 U. S. 386.
- Railroad Co. v. Matthews, 58 Kan. 447.  
See Atchison, Topeka, &c., Rld. v. Matthews, 174 U. S. 96.
- Railroad Co. v. Morasch, 60 Kan. 251.  
See Erb v. Morasch, 177 U. S. 584.
- Railway Co. v. Herman, 64 Kan. 546.  
See K. C. Suburban Belt Ry. Co. v. Herman, 187 U. S. 63.
- Railway Co. v. Martin, 59 Kan. 437.  
See C., R. I., &c., Ry. Co. v. Martin, 178 U. S. 245.

- Railway Co. v. Sessions, 95 Kan. 261.  
See Kansas City Ry. v. Kansas, 240 U. S. 227.
- Reitler v. Harris, 80 Kan. 148.  
See Reitler v. Harris, 228 U. S. 437.
- Schrimpscher v. Stockton, 58 Kan. 758.  
See Schrimpscher v. Stockton, 183 U. S. 290.
- Smith v. Bowersock, 95 Kan. 96.  
See Bowersock v. Smith, 243 U. S. 29.
- State v. Asbell, 74 Kan. 397.  
See Asbell v. Kansas, 209 U. S. 251.
- State v. Atkin, 64 Kan. 174.  
See Atkin v. Kansas, 191 U. S. 207.
- State v. Durein, 70 Kan. 1.  
See Fritz Durein v. Kansas, 208 U. S. 613.
- State, *ex rel.*, v. Akers, 92 Kan. 169.  
See Wear v. Kansas, 245 U. S. 154.
- State, *ex rel.*, v. Gas Co., 88 Kan. 165.  
See Wyandotte Gas Co. v. Kansas, 231 U. S. 623.
- State, *ex rel.*, v. Sessions, 95 Kan. 272.  
See C. R. I. & P. Rly. Co. v. State of Kansas, *ex rel.*,  
245 U. S. 627.
- State v. Jack, 69 Kan. 387.  
See Jack v. Kansas, 199 U. S. 372.
- State v. Mugler, 29 Kan. 252.  
See Mugler v. Kansas, 123 U. S. 623.
- State v. Railway Co., 76 Kan. 467.  
See Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262.
- State v. Ross, 71 Kan. 856.  
See Ross v. The State of Kansas, 208 U. S. 613.
- State v. Smiley, 65 Kan. 240.  
See Smiley v. Kansas, 196 U. S. 447.
- Stevens v. Smith, 2 Kan. 243.  
See Smith v. Stevens, 77 U. S. 321.
- Wiggin v. King, 35 Kan. 410.  
See Wiggan v. Conolly, 163 U. S. 56.
- Wilkins v. Tourtellott, 42 Kan. 176.  
See Wilkins v. Tourtellott, 149 U. S. 791.

## DISMISSED. •

- Bigger v. Ryker, 62 Kan. 482.  
See Bigger v. Ryker, 184 U. S. 696.
- Bridge Co. v. Railroad Co., 91 Kan. 887.  
See Commonwealth Trust Co. v. Trocon, 235 U. S. 685.
- Caspar v. Lewin, 82 Kan. 604.  
See Lewin v. Caspar, 223 U. S. 736.

- Clay Center v. Light Co., 78 Kan. 390.  
See Clay Center Light Co. v. Clay Center, 212 U. S. 504.
- Cudahy v. Denton, 79 Kan. 368.  
See Cudahy Packing Co. v. Denton, 228 U. S. 784.
- Davis v. Coventry, 65 Kan. 557.  
See Coventry *et al.* v. Davis *et al.*, 193 U. S. 668.
- Dobbs v. The State, 63 Kan. 321.  
See Dobbs and New v. Kansas, 184 U. S. 696.
- Duggan v. Railway Co., 96 Kan. 249.  
See Missouri Pacific Railway Co. v. Duggan, 243 U. S. 657.
- Edson v. Olathe, 81 Kan. 328.  
See Missouri Ry. Co. v. Olathe, 222 U. S. 185.
- End. and Ben. Asso. v. The State, 35 Kan. 253.  
See Kansas End. Asso. v. Kansas, 120 U. S. 103.
- Fowler v. Wood, 78 Kan. 510.  
See Meriwether v. Wood, 212 U. S. 586.
- Grain and Lumber Co. v. Railway Co., 85 Kan. 281.  
See A. T. & S. F. Rly. Co. v. Starr Grain Co., 231 U. S. 763.
- Hughes v. Kepley *et al.*, 60 Kan. 859.  
See Hughes v. Kepley *et al.*, 191 U. S. 557.
- In re* Hanson, 80 Kan. 783.  
See Hanson v. Gustafson, 226 U. S. 600.
- Insurance Co. v. National Bank, 58 Kan. 86.  
See German Ins. Co. v. First Nat. Bank, 173 U. S. 702.
- Kansas City v. Stewart, 90 Kan. 846, 92 Kan. 406.  
See Stewart v. Kansas City, 239 U. S. 14.
- Killmer v. Stewart (No. 19834. No opinion filed).  
See Killmer v. Stewart, 239 U. S. 653.
- Larabee v. Railway Co., 94 Kan. 683, 694.  
See Mo. Pac. Rly. Co. v. Larabee Mills, 241 U. S. 649.
- Larson v. Cox, 39 Kan. 681.  
See Larson v. Cox, 145 U. S. 644.
- Live Stock Co. v. Trading Co., 87 Kan. 221.  
See Holden Land Co. v. Inter-State Co., 233 U. S. 537.
- McClain v. Parker, 88 Kan. 717, 873.  
See Parker v. McClain, 237 U. S. 469.
- Manley v. Larkin, 59 Kan. 528.  
See Manley v. Larkin, 45 L. Ed., 1256.  
(Not reported officially.)
- Marks v. Davis, 87 Kan. 796.  
See Marks v. Davis, 227 U. S. 682.
- Olathe v. Edson, 84 Kan. 408.  
See Interurban Ry. Co. v. Olathe, 222 U. S. 187.
- Olathe v. Ogg, 84 Kan. 890.  
See Interurban Ry. Co. v. Olathe, 222 U. S. 191.

- Olson v. Cox**, 39 Kan. 634.  
See *Olson v. Cox*, 145 U. S. 650.
- Sanger v. Rice**, 43 Kan. 580.  
See *Rice v. Sanger*, 144 U. S. 197.
- Sewell v. Railway Co.**, 78 Kan. 1, 16.  
See *A. T. & S. F. Rly. Co. v. Sewell*, 215 U. S. 612.
- Simpson v. Greeley**, 8 Kan. 586.  
See *Simpson v. Greeley*, 87 U. S. 152.
- Smith v. Railroad Co.**, 95 Kan. 451.  
See *Railroad Co. v. Smith*, 242 U. S. 669.
- State v. Baldwin**, 36 Kan. 1.  
See *Baldwin v. Kansas*, 129 U. S. 52.
- State v. Book Co.**, 65 Kan. 847.  
See *American Book Co. v. Kansas*, 193 U. S. 49.
- State v. Briggs**, 94 Kan. 92.  
See *Briggs v. Kansas*, 242 U. S. 615.
- State, ex rel., v. Sessions**, 95 Kan. 272.  
See *Railway Co. v. The State, ex rel.*, 242 U. S. 654.  
See *Railway Co. v. The State, ex rel.*, 242 U. S. 669.
- State, ex rel., v. Stock Yards Co.**, 94 Kan. 96.  
See *Kansas City Stock Yards Company v. State of Kansas, ex rel.*, 245 U. S. 674.
- State v. Holcomb**, 85 Kan. 178.  
See *Kansas City, Mo., v. The State*, 226 U. S. 599.
- State v. Meyer**, 86 Kan. 793.  
See *Meyer v. Kansas*, 232 U. S. 734.
- State v. Plamondon**, 75 Kan. 269.  
See *Plamondon v. Kansas*, 215 U. S. 615.
- State v. Rose**, 74 Kan. 262.  
See *Rose v. Kansas*, 203 U. S. 580.
- State v. Scott Co.**, 58 Kan. 491.  
See *Scott County v. Kansas*, 174 U. S. 799.
- State v. Sheasley**, 71 Kan. 857.  
See *James Sheasley v. The State of Kansas*, 207 U. S. 600.
- State v. Terry**, 98 Kan. 796.  
See *William Terry v. State of Kansas*, 243 U. S. 662.
- State v. Thomas**, 74 Kan. 360.  
See *Chod Thomas v. Kansas*, 205 U. S. 535.
- State v. Tillotson**, 85 Kan. 577.  
See *Tillotson v. Kansas*, 232 U. S. 728.
- Thayer v. Schaben**, 79 Kan. 856.  
See *Thayer v. Schaben*, 223 U. S. 714.
- Topeka v. Kersch**, 70 Kan. 840.  
See *Kersch v. Topeka*, 207 U. S. 600.

## MODIFIED.

- Fackler v. Ford *et al.*, McCahon, 21, 1 Kan. [Dass. ed.] 463.  
See Fackler v. Ford *et al.*, 65 U. S. 322.

## REVERSED.

- Ard v. Brandon, 43 Kan. 425.  
See Ard v. Brandon, 156 U. S. 537.
- Ard v. Pratt, 43 Kan. 419.  
See Ard v. Pratt, 156 U. S. 537.
- Beverly v. Barnitz, 55 Kan. 466.  
See Barnitz v. Beverly, 163 U. S. 118.
- Blue-Jacket v. Johnson County *et al.*, 3 Kan. 299.  
See The Kansas Indians, 72 U. S. 737.
- Buck v. Vickers, 80 Kan. 29.  
See Buck Stove Co. v. Vickers, 226 U. S. 205.
- Drainage District v. Railway Co., 87 Kan. 272.  
See Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75.
- Dunbar v. Green, 66 Kan. 557.  
See Dunbar v. Green, 198 U. S. 166.
- Hampe v. Sage, 87 Kan. 536.  
See Sage v. Hampe, 235 U. S. 99.
- Harold v. Railway Co., 93 Kan. 456.  
See Atchison & Topeka Rly. v. Harold, 241 U. S. 371.
- K. P. Rly. Co. v. Culp, 9 Kan. 38.  
See Railway Company v. Prescott, 83 U. S. 603.
- Larabee v. Railway Co., 85 Kan. 214.  
See Mo. Pac. Rly. Co. v. Larabee, 234 U. S. 459.
- Miami County v. Wan-zop-pe-che *et al.*, 3 Kan. 364.  
See The Kansas Indians, 72 U. S. 759.
- Mo. Pac. Rly. Co. v. Sharitt, 43 Kan. 375.  
See C. R. I., &c., Railway v. Sturm, 174 U. S. 710, 713.
- Morris v. Greenlees, 90 Kan. 472.  
See Greenlees v. Morris, 239 U. S. 627.
- Railway Co. v. Albers, 79 Kan. 59.  
See K. C. So. Ry. Co. v. Albers Comm. Co., 223 U. S. 573.
- Railway Co. v. Campbell, 58 Kan. 818.  
See C. R. I. &c. Railway v. Campbell, 174 U. S. 718.
- Railway Co. v. Sturm, 58 Kan. 818.  
See C. R. I., &c., Railway v. Sturm, 174 U. S. 710.
- Rankin v. Barton, 69 Kan. 629.  
See Rankin v. Barton, 199 U. S. 228.
- Robertson v. Howard, 83 Kan. 453.  
See Robertson v. Howard, 229 U. S. 254.
- State v. Coppage, 87 Kan. 752.  
See Coppage v. Kansas, 236 U. S. 1.

- State v. Kirmeyer**, 88 Kan. 589.  
See **Kirmeyer v. Kansas**, 236 U. S. 568.
- State v. Pullman**, 75 Kan. 664.  
See **Pullman Co. v. Kansas**, 216 U. S. 56.
- State v. Saunders**, 19 Kan. 127.  
See **Geer v. Connecticut**, 161 U. S. 519, 534, 540.
- State v. Telegraph Co.**, 75 Kan. 609.  
See **West. Un. Tel. Co. v. Kansas**, 216 U. S. 1.
- Text-book Co. v. Pigg**, 76 Kan. 328.  
See **International Text Book Co. v. Pigg**, 217 U. S. 91.
- Tucker v. Railway Co.**, 82 Kan. 222.  
See **Missouri Pacific Ry. Co. v. Tucker**, 230 U. S. 340.
- Tullock v. Mulvane**, 61 Kan. 650.  
See **Tullock v. Mulvane**, 184 U. S. 497.
- U. P. Rly. Co. v. Harwood**, 31 Kan. 388.  
See **Pacific Railroad Removal Cases**, 115 U. S. 1.
- Vosburg v. Railway Co.**, 89 Kan. 114.  
See **Atchison & Santa Fe Ry. v. Vosburg**, 238 U. S. 56.
- Wilson v. Hawkins**, 80 Kan. 117.  
See **Wilson-Moline Buggy Co. v. Hawkins**, 223 U. S. 713.

## NOTE.

This volume contains all of the opinions that were filed from December, 1917, to April, 1918, inclusive. It contains 211 formal opinions delivered by the justices as follows: JOHNSTON, C. J., 29; BURCH, J., 25; MASON, J., 31; PORTER, J., 31; WEST, J., 31; MARSHALL, J., 32; DAWSON, J., 32. Mr. Chief Justice JOHNSTON dissented in seven cases (pp. 23, 87, 384, 390, 534, 646, 797). Mr. Justice BURCH rendered a specially concurring opinion in one case (p. 84), concurred specially in one case (p. 591), and dissented in one other case (p. 646). Mr. Justice MASON rendered a specially concurring opinion in one case (p. 360), and a dissenting opinion in one other case (p. 85). Mr. Justice PORTER concurred specially in one case (p. 361), rendered a dissenting opinion in one case (p. 627), and dissented in three other cases (pp. 87, 214, 797). Mr. Justice WEST concurred specially in one case (p. 518), rendered dissenting opinions in three cases (pp. 699, 724, 821), and dissented in three other cases (pp. 384, 709, 797). Mr. Justice MARSHALL concurred specially in one case (p. 518), rendered a dissenting opinion in one case (p. 707), and dissented in four other cases (pp. 23, 390, 433, 534). Mr. Justice DAWSON rendered a specially concurring opinion in one case (p. 518), rendered dissenting opinions in four cases (pp. 245, 433, 534, 708), and dissented in three other cases (pp. 23, 513, 724). An opinion *per curiam* was delivered in one case, (p. 3).

# SUPREME COURT, STATE OF KANSAS.

JULY TERM, 1917.

PRESENT:

|  |           |
|--|-----------|
| HON. WILLIAM A. JOHNSTON, CHIEF JUSTICE. |           |
| HON. ROUSSEAU A. BURCH,                  | }         |
| HON. HENRY F. MASON,                     |           |
| HON. SILAS W. PORTER,                    |           |
| HON. JUDSON S. WEST,                     |           |
| HON. JOHN MARSHALL,                      |           |
| HON. JOHN S. DAWSON,                     | JUSTICES. |

No. 20,316.

FREMONT RODGERS, *Appellant*, v. O. R. SLAVENS, *Appellee*.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion on rehearing filed December 8, 1917. Former opinion of affirmance adhered to. (For original opinion see 101 Kan. 4, 165 Pac. 655.)

*Carr W. Taylor*, of Hutchinson, *John H. Connaughton*, and *H. E. Walter*, both of Kingman, for the appellant.

*Frank L. Martin*, *Van M. Martin*, and *Howard S. Lewis*, all of Hutchinson, for the appellee.

OPINION ON REHEARING.

The opinion of the court was delivered by

DAWSON, J.: In the opinion in this case handed down in June (101 Kan. 4) an excerpt of appellant's testimony taken from the transcript was quoted as evidence in support of defendant's contention that appellant Rodgers retained his interest in the cattle when they were sold to Rawlins. At the rehearing the court has been advised that this testimony had reference to a phase of the lawsuit not before this court on



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Rodgers v. Slavens.

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appeal. There was, however, pertinent evidence sufficient to support defendant's contention on the matter under review. As was said in our original opinion:

"Other features of the evidence were, that the freight bill on the cattle from El Paso to Dalhart was \$1,600; that in the presence of a witness, who was the president of a Hutchinson bank, a conversation occurred at the sick bed of Slavens, where Rodgers explained that he was the owner of a half interest in the cattle sold to Rawlins, and that the interest of Slavens, which was the \$1,142 which he had advanced on the original purchase price, and his share of the profits by the sale to Rawlins, \$800, should be paid to the Hutchinson bank for the benefit of Slavens. To another witness Rodgers asserted that he had a half interest in the cattle. Rodgers received all the cash paid by Rawlins; Slavens none." (p. 7.)

Elsewhere it appears in Slavens' cross-examination:

"Q. You knew Rodgers was only acting as a commission man? A. No, sir, he owned a half interest in these cattle."

This accords in part with Rodgers' testimony, where he stated that it was a half interest in the cattle which Slavens sold to Rawlins.

On October 21, 1911, Rodgers wrote to Rawlins:

"I know that it was understood the day the sale was made, that you were only buying one-half interest in the cattle."

On December 22, 1911, Rodgers wrote to Rawlins:

"When Mr. Slavens sold you the cattle I owned a half interest in them at that time, I supposed I was out of the deal. . . . As it now stands I do not know whether I own a one-sixth [?] interest in the steers or not."

It is needless to rehearse the evidence at greater length. It has been thoroughly considered; and notwithstanding some conflict of evidence and some evidence to the contrary, the court holds that it was amply sufficient to prove defendant's contention that Rodgers was interested as a principal throughout the entire transaction involved in this cattle deal; that he owned a half interest in the cattle when he and Slavens bought them, and that he retained his half interest after Rawlins acquired the interest of Slavens; that when he paid the note sued on he paid his own and Rawlins' debt; and, so far as the pleadings, evidence and findings in this case disclose, the defendant Slavens owed Rodgers nothing—either as maker, surety, or indorser, and the net result in the district court was in substantial accord with the demands of justice. The judgment is again affirmed.

No. 20,523.

*In re* JUSTUS B. LINDERHOLM (MRS. AGNES EKBLAD, *Appellee*,  
v. JUSTUS B. LINDERHOLM, *Appellant*).

## HEADNOTE BY THE REPORTER.

INSANE PERSON—*Guardian May be Appointed without Notice.* A probate court may, without notice, appoint a successor to a guardian for a lunatic, who has been duly adjudged to be a person of unsound mind, confined in the state hospital, and discharged therefrom as improved.

Appeal from McPherson district court; ROSWELL L. KING, judge *pro tem*. Opinion filed December 8, 1917. Affirmed.

*Justus B. Linderholm*, of Topeka, *pro se*.

*G. Nyquist*, and *Frank O. Johnson*, both of McPherson, for the appellee.

*Per Curiam*: This is an appeal to this court in the *Justus B. Linderholm* matter. (See, *The State v. Linderholm*, 95 Kan. 669, 670, 149 Pac. 427; *In re Linderholm, Petitioner*, 101 Kan. 18, 165 Pac. 830.)

The present appeal is from an order overruling a demurrer to an application for the appointment of a guardian for the estate of *Justus B. Linderholm*. He had previously been adjudged insane by the probate court of McPherson county, and had been confined in the state hospital for the insane. He was afterward discharged as improved. His guardian died, and the guardian's wife, who was the sole heir and legatee of the guardian, made the application in question. She made that application in order that the estate of the guardian might be settled. No notice of the application was given to *Linderholm*.

Numerous attacks are made on the proceedings, but only one question is properly presented by the demurrer to the application for the appointment of a guardian: Did the probate court have jurisdiction to appoint a guardian without first giving notice to *Linderholm*? The particular question involved in this appeal, and all other questions raised, are answered in *Johnson v. Gustafson*, 96 Kan. 630, 152 Pac. 621, where this court said:

"A probate court may without notice appoint a successor to a guardian

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for a lunatic who has been duly adjudged to be a person of unsound mind, confined in the state hospital for the insane, and discharged therefrom as improved." (Syl. ¶ 1.)

The judgment is affirmed.

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No. 20,605.

THE WELSBACH STREET LIGHTING COMPANY, *Appellant*, v. THE CITY OF WICHITA, *Appellee*.

Appeal from Sedgwick district court, division No. 1; THOMAS C. WILSON, judge. Opinion denying a rehearing filed December 8, 1917. (For original opinion of reversal see 101 Kan. 452.)

*S. B. Amidon, W. M. Dedrick*, both of Wichita, and *J. W. Dana*, of Kansas City, Mo., for the appellant.

*Earl Blake*, and *J. N. Haymaker*, both of Wichita, for the appellee; *R. C. Foulston*, city attorney, of counsel.

OPINION DENYING A REHEARING.

The opinion of the court was delivered by

DAWSON, J.: In a petition for a rehearing some minor matters are again urged upon our attention which were not discussed in the court's opinion in this case. (101 Kan. 452.) We note them now. No legal significance is attached to the letter of the city clerk dated November 1, 1910, addressed to plaintiff, giving notice that the city "will discontinue the use of street lights furnished by your company under contract, which expired on the 31st day of June, 1910," etc. As we have seen, the contract did not expire in June, and if plaintiff had given countenance to this letter it would have but added another circumstance to the incidents discussed in our former opinion upon which the defendant relied to establish a waiver. The same observation may be made as to the telegram of January 4, 1911, sent to plaintiff by one of the city commissioners, threatening certain consequences if plaintiff did not remove its property *within fifteen days*. That telegram did not terminate the contract. These incidents merely tend to show that the city was seeking some strategic means of getting rid of its con-

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tractual relations with plaintiff. It does not fall within a court's province to teach parties how they may effectively breach and terminate their contracts, but some reference thereto will be found in *Construction Co. v. Sedgwick County*, 100 Kan. 394, 164 Pac. 281.

A suggestion is made that the trial court will not know what judgment to enter, intimating that there is some dispute as to the proper computation of interest. This matter was not raised in the appeal, but it may be helpful to say that the defaulted payments for the lighting services performed should only draw simple interest at the legal rate from the dates when they were severally due under the contract. Of course, the damages for the breach of the contract do not begin to bear interest until the judgment is rendered.

Rehearing denied.

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No. 20,649.

T. F. GARNER, *Appellee*, v. THE DODGE CITY WHOLESALE GROCERY COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. TRIAL—*Motion for Continuance—Absent Witness—Judicial Discretion.* No abuse of discretion is shown in refusing the application of a corporation defendant for a continuance in order to procure the attendance of its president, who had absented himself with knowledge that the case had been set for trial.
2. LEASE—*Landlord's Promise to Repair.* Where a written lease provides that repairs are to be made by the tenant, the landlord's subsequent promise to make them is not enforceable, unless supported by a new consideration.
3. SAME—*No Implied Obligation to Make Repairs.* The landlord is not under any implied obligation to make repairs.

Appeal from Ford district court; LITTLETON M. DAY, judge.  
Opinion filed December 8, 1917. Affirmed.

J. M. Kirkpatrick, of Dodge City, for the appellant.

L. A. Madison, and Carl Van Riper, both of Dodge City, for the appellee.

The opinion of the court was delivered by

MASON, J.: T. F. Garner brought an action against his tenant, the Dodge City Wholesale Grocery Company, for a balance due as rent, and for injuries done to the rented property. The defendant denied liability and set up a counterclaim by reason of injuries to goods, caused by a defective roof. Judgment was rendered for the plaintiff and the defendant appeals.

1. When the case was reached for trial the defendant's attorney asked a continuance on account of the absence of a witness—the president of the company. The request was denied, and complaint is made of that ruling. No such showing was made as to give the defendant a right to a continuance under the statute. The matter rested in the discretion of the trial court. It appears that the witness had been present a few days before and had known of the case being set for trial. In that situation there is no room for a contention that there was any abuse of discretion.

2. The lease was in writing and contained no provision for repairs by the landlord. On the contrary, by its express terms, the tenant agreed that during the life of the lease it would at its own expense "keep said premises and every part thereof in good repair." The defendant offered to show a subsequent oral promise of the plaintiff to make repairs to the roof, but admitted that it was not supported by any new consideration. The court properly rejected the offer. (24 Cyc. 1085.)

"It has frequently been held that the landlord is under no obligation to make repairs, unless such a stipulation is made a part of the original contract, and that any subsequent promise to make repairs, founded merely on the relation of the parties and not one of the considerations of the lease, is without consideration, and for that reason creates no liability." (16 R. C. L. 1033.)

3. The final complaint is of the refusal of the court to allow proof of injuries to the plaintiff's goods caused by the leaky roof. Whether or not this would have afforded a proper measure of damages if the landlord had agreed to make repairs (as to which see *Murrell v. Crawford*, post, p. 118), in the absence of such an agreement no liability on the part of the plaintiff was created by the facts offered to be shown, since he was under no implied duty in that respect. (16 R. C. L. 1030-1033.)

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The appellant cites many cases in which the landlord was held liable for damages on account of losses occasioned by his failure to repair, but in each of them he had expressly assumed such an obligation or, as in *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627, had attempted to make repairs and injury resulted from the unskillfulness of the work.

The judgment is affirmed.

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No. 20,841.

GEORGE A. GRISIER, *Appellee*, v. THE FARMERS STATE BANK OF BELPRE et al., *Appellants*.

SYLLABUS BY THE COURT.

NOTE AND MORTGAGE—*Relationship of Parties—Presumptions of Fraud.*

Failure of consideration and fraudulent purpose in the giving of a note and chattel mortgage will not be presumed because of the relationship of the parties.

Appeal from Stafford district court; DANIEL A. BANTA, judge. Opinion filed December 8, 1917. Affirmed.

*Ray H. Beals*, of St. John, and *F. L. Martin*, of Hutchinson, for the appellants.

*Robert Garvin*, of St. John, for the appellee.

The opinion of the court was delivered by

PORTER, J.: On the first day of May, 1914, H. D. Prose and his wife gave their promissory note to Geo. A. Grisier for \$1,685, secured by a chattel mortgage on a growing crop of wheat in Stafford county. Geo. A. Grisier is the brother of Mrs. Prose. He resided at the time in the state of Washington. Prose filed the chattel mortgage for record and sent the note by mail to his brother-in-law.

On May 23, 1914, the Farmers State Bank of Belpre, which had obtained a judgment against Prose in February, caused an execution to issue and it was levied on the wheat. At the sale the bank purchased the wheat for \$300.

This action is by Grisier against the bank and the sheriff to recover the value of the wheat.

The answer alleged that the chattel mortgage was fraudulent; that there was no valid indebtedness due the plaintiff from Prose; and that he executed the chattel mortgage and placed it on record without the knowledge of the plaintiff. The reply was a general denial.

The case was tried by the court and judgment was rendered in plaintiff's favor for \$925, which the parties stipulated was the value of the wheat. The bank and the sheriff appeal.

The principal contention is that the evidence was not sufficient to sustain the judgment. It is said in the brief "that the appellants believe the giving of the chattel mortgage was a fraudulent transaction, . . . merely a scheme to keep the bank from collecting its judgment," and that Geo. A. Grisiere "became a party to the fraudulent transaction." Our attention is called to the circumstances in which the note and mortgage were given, and other circumstances and facts shown at the trial, which the defendants insist uphold their contention. In their brief appellants say, "The abstract is the strongest argument."

There is no merit in the appeal. There was abundant evidence to show that Prose and his wife were justly indebted to the plaintiff to the amount of the note and mortgage. The fact that Prose was insolvent at the time, the fact that the plaintiff is his brother-in-law, and all the other circumstances connected with the execution of the note and mortgage were fully inquired into by the court, and the general judgment is a finding against appellant's claim of fraud. The brief cites the case of *Thomas v. Rauer*, 62 Kan. 568, 64 Pac. 80, in support of the proposition that if the chattel mortgage was given by Prose in order to defraud the bank then it is void. In that case the court found that there was fraud. Here the court has found there was no fraud. It is contended that the court was in error in ruling that the defendants had the burden of proof. The theory seems to be that because of the relationship between the plaintiff and Prose the transaction is presumed to be fraudulent and that the burden rested upon the plaintiff to show that it was not. The court rightly held that the defendants who alleged fraud had the burden of proving it. (*Baughman, Sheriff, v. Penn*, 33 Kan. 504, 6 Pac. 890.) As said in the opinion in *Parmenter v. Lomax*, 68 Kan. 61, 74 Pac. 634:

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"We are asked to presume a failure of consideration and fraudulent purpose on the part of Latimer by reason of his relationship to the other parties, and his transfer of the property to his grandsons, who were insolvent. This we cannot do. Fraud is not presumed." (p. 65.)

There was no error in rejecting the testimony in rebuttal showing that the debt which had merged in its judgment against Prose was an honest debt. The purpose of the testimony was to contradict a statement made by Prose, who was a witness for the plaintiff, and who said on cross-examination that the bank obtained a judgment on him which was not an honest one. He was not a party to the action. The plaintiff does not base his right to recover on the contention that the bank's judgment was not valid and just. That it is valid is conceded.

The judgment is affirmed.

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No. 20,898.

REBECCA HARVEY, *Appellee*, v. THE CITY OF BONNER SPRINGS,  
*Appellant*.

## SYLLABUS BY THE COURT.

1. **MOB VIOLENCE—Death—Action for Damages—Pleadings—Evidence.** In an action against a city under section 3822 of the General Statutes of 1915, to recover damages in consequence of the action of a mob, the petition is held sufficient to state a cause of action, and the plaintiff's evidence is held sufficient as against a demurrer.
2. **SAME—Weight of Evidence for Jury.** Upon the facts stated in the opinion, it is held that the court committed no error in refusing to direct a verdict for the defendant.
3. **SAME—Defense—Sheriff's Posse—Deceased Resisting Arrest—Instructions.** In an action against a city to recover damages for the acts of an alleged mob in causing the death of plaintiff's husband, the answer alleged that he had committed a felony by shooting at the city marshal with a revolver; that the city marshal, who was also a deputy sheriff, summoned a posse to aid in arresting him; that he resisted arrest and was killed while in the act of drawing his revolver; and that the killing was justified. *Held*, that the instructions given correctly stated the law upon the issue raised by the answer.
4. **SAME—Attempting Arrest of Deceased—Good Faith Question for Jury.** In such a case it is held that it was a question of fact for the jury to determine whether the plaintiff's husband had committed a felony, and



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also whether the crowd of men around plaintiff's house were acting in good faith in attempting to arrest her husband and shot him in the honest belief that it was necessary to do so, or whether, as plaintiff claimed, they formed during the time they were assembled a purpose and intent to take his life, and that in carrying out that unlawful purpose he was killed.

5. *SAME—Wrongful Death—Verdict for Plaintiff Sustained.* On the facts stated in the opinion it is held that the court cannot declare as a matter of law that the persons summoned by the officer in the present case did not constitute a mob within the meaning of the statute, since the motive which actuated them, not only when they assembled, but also at the time the death of plaintiff's husband was brought about, became questions of fact; and if on these vital issues reasonable minds might draw different conclusions from the evidence, the verdict in plaintiff's favor cannot be disturbed.

Appeal from Wyandotte district court, division No. 3; **WILLIAM H. MCCAMISH**, judge. Opinion filed December 8, 1917. Affirmed.

*James F. Getty*, of Kansas City, for the appellant.

*Henry Dean*, and *J. E. McFadden*, both of Kansas City, for the appellee.

The opinion of the court was delivered by

**PORTER, J.:** Rebecca Harvey brought this action against the city of Bonner Springs, a city of the third class, to recover damages for the death of her husband. The jury returned a verdict in her favor for \$8,500, and judgment was rendered thereon, from which the city appeals.

The action is sought to be maintained under the provisions of section 3822 of the General Statutes of 1915, which provides:

"All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of mobs within their corporate limits, whether such damages shall be loss of property or injury to life or limb."

The petition alleged:

"That on said 18th day of December, 1913, a large number of persons, residents and citizens of the town of Bonner Springs, Kansas, congregated and assembled at and around the home of this plaintiff and her husband, Rolla Harvey, within the corporate limits of said Bonner Springs, and while so assembled, and while the said Rolla Harvey was coming out of his home at their direction and request, said assemblage

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of persons unlawfully assaulted the said Rolla Harvey with shot guns and revolvers and inflicted upon him mortal wounds which caused his death."

The answer alleged that Rolla Harvey had committed a felony on the night before his death by shooting at the city marshal with a revolver; that Easling, the city marshal, who was also a deputy sheriff, summoned a posse to his aid in attempting to arrest Harvey the next morning; that Harvey resisted the officer and the posse, shot at them, and that on being asked to surrender, refused, and that while he was in the act of drawing his revolver one of the posse shot him in self-defense, and that the killing was justified.

Rolla Harvey, the plaintiff's husband, at the time of his death was thirty-nine years old. He was a structural steel mechanic in the employ of a bridge company, for which he had been working for six or eight years and held a position as foreman, earning from \$4.50 to \$6.00 a day. The family consisted of himself, his wife, and two children, the eldest a boy of less than five years, and a girl less than a year old. For eighteen months Harvey had been a tenant of the city, living in one of two upstairs apartments in the city hall.

The city hall at Bonner Springs is a two-story brick building at the corner of Second and Cedar streets. It is 53 feet long north and south, and 42 feet wide east and west; it fronts south on Second, and its west side abuts on Cedar street, which runs north and uphill; the yard in the rear of the building is above the street, and about on a level with the second story. Extending across the rear of the second story is a porch five feet wide, and from the west end of it steps extend down to Cedar street. On the elevated ground in the rear of the building, and facing west, is what is termed in the evidence the "Crow house," the porch of which is about 7 feet wide and 23 feet long, and runs at right angles to the porch on the rear of the upstairs of the city building. The south end of the Crow porch is only three and a half feet from the city-hall porch, and practically on a line with the door leading from the hallway out upon the city-hall porch. This hallway divides the two apartments upstairs in the city building, on the west side of which lived Rolla Harvey and his family, the east side being occupied by Easling, the city marshal, and his wife. The premises

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occupied by Rolla Harvey and his family consisted of three rooms, the first room from the north was the kitchen; the next to the south was the living room; and the third was the bedroom; each of these rooms was connected by a door leading out into the center hall. Each room had a window opening west on Cedar street, and the kitchen had two windows opening north on the porch.

By the special findings the jury found that Harvey had committed no felony as claimed by the city.

The evidence introduced by the plaintiff in reference to what occurred the night before was, that about half past eleven o'clock Harvey and a man by the name of Rhodes came down from the Harvey home to the street. Easling, the city marshal, who lived across the hall from Harvey in the same building, followed them downstairs and spoke to them on the street and said: "Ain't you out kind of late to-night?" One of the men replied, "I don't know as it's any of your damn business." To which Easling replied, "I will make it some of my business." The testimony of the witness Adair as to what transpired then was as follows:

"And just then somebody busted him, hit him, knocked him out in the street, knocked him fifteen or twenty feet, and he raised up and shot the first time through the air, sitting down and shot up that way, the next time he shot up that way, north, Easling did. I don't know which one busted Easling; the way he rolled, they must have both hit him. Harvey went in the house, Rhodes ran up the hill, Easling ran toward the depot after he fired those two shots. There were no other shots fired then at that time than the ones I mentioned."

The evidence of the plaintiff went to show that when the Harvey family awoke from their sleep the next morning, they found their home surrounded by men with pistols and shotguns. Sometime after Harvey got up, he dressed, went to the kitchen and washed. He then stepped out on the porch to empty the wash basin. There is a conflict in the evidence as to what then occurred. The plaintiff's evidence tended to show that Harvey was at once met with a volley of shots from revolvers and shotguns fired by men, some of whom were standing under the roof of the porch on the Crow house, others around the corners of buildings and behind a tree. As a result of this fusilade, one of the posse, Webber, was shot in the fleshy part of the leg, undoubtedly by a shot from Harvey's

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revolver; Harvey was shot in the left breast by a shotgun fired by one of the posse. Harvey went back into his house, told his wife he had been wounded, and called to his little boy to go for a doctor. Mrs. Harvey was afraid to let the child go and said that she would summon aid. She went to the window on the west side of the bedroom, for the purpose of calling to outsiders, and as she raised the blind she was confronted with a shotgun in the hands of another of the posse, O'Donnell, who had been stationed across the street. She screamed and got back from the window, and started to cross the hall for the purpose of using the telephone in the Easling apartments. When she reached the hall she was ordered back by Milstead, who pointed a shotgun towards her, and she retreated into one of the rooms. Milstead was standing at this time only a few yards from her on the porch of the Crow house directly in line with the hallway.

An interval of about fifteen minutes occurred between the first and the second shooting. During this lull in the hostilities, and while the Harvey family were in their rooms, Easling, the city marshal, who had summoned the posse, said, "Well, I will just shoot in the window once and see if I can raise him." He then fired with a shotgun through the screen in the west window. When this shot was fired Mrs. Harvey came out into the hall again and Milstead asked, "Will he come out? Will he surrender?" She said, "Well, I will see." She went in and told her husband that they wanted to know if he would surrender, and Harvey said: "Yes, tell them to come on in." She then went out in the hall and told Milstead what her husband had said, and Milstead replied, "We will never come in there, tell him to come out." Mrs. Harvey then went back to her husband and told him they said for him to come out, they would n't come in; and he got up and went out; she went with him. She testified that when Harvey went out, she went out the kitchen door with him; she had the children with her, the baby in her arms, and the little boy by her side. Harvey was a little in advance of her on the porch; she stood in the doorway of the hall, when some one said, "Go back in there; put them children back in there." "Get the children out of the way." "Get in there"; that they all had their guns in their hands, and she put the little boy back and stepped back herself; and just as

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she stepped back, and as her husband started to raise his arms, they fired, and he staggered up against the door casing, turned, walked back into the kitchen, and fell over on his face, dead. "He did not have any gun in his hands or weapon in his clothes at that time."

Timmons, a farmer living near Bonner Springs, a friend of Harvey in his lifetime, was a witness for plaintiff. He was on the street near the city hall just before the second shooting occurred. He observed the parties had guns, and he talked with O'Donnell who was standing across the street from the city hall armed with a shotgun. When Timmons learned who it was they were trying to arrest, or wanted, he said to O'Donnell, "I will get Rolla for you," but O'Donnell replied, "No, Timmons, we are going to get him." The witness said, "All right, if you want to get into trouble, go ahead," and turned around and went away and left him.

Mr. Longfellow, who was mayor of the city, and who had been sheriff of the county for two terms, was a witness for the defense. His testimony is, that the night before, when Marshal Easling consulted with him with reference to the trouble with Harvey, he advised him to get some guards to guard the house until after daylight. "And I told him that I believed when the whisky died out on him, he would surrender without any trouble. They left my house and went away." He further testified that a little after seven o'clock the next morning he was present at the first exchange of shots between the besiegers and Harvey. There were five persons in the crowd besides himself at that time. He described the position of the men surrounding the house; Easling, O'Donnell and Lawrence were at the corner of the house, and Webber about opposite the center of the porch. Milstead, it appears, was behind a tree in the yard. During the shooting, the witness heard Webber say, "I am shot," and Webber then took his shotgun, aimed in the direction where Harvey stood, and fired. After the first shooting, the mayor left and went back to his work.

O'Donnell was a witness for the defense. About one o'clock the night before the shooting he heard Easling direct Webber to stay at the back of the building and guard it. Easling directed the witness to go and get a revolver. Webber made some reference to having a shotgun and Easling told him to get it.

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Easling gave orders that they were all to be at the city hall at daylight. The witness arrived at the scene with Mayor Longfellow and Milstead. When he arrived there were present besides himself, Milstead and the mayor, Easling, Webber and Norvall Lawrence.

"Harvey was just in the act of coming out of the door, pushing the screen open when I first saw him. The porch is 5 feet wide according to the plat. . . . I should say he took at least two steps from the door, a little left of what would be straight forward; I observed him with a wash pan in his hand. . . . My impression was, and is yet, that at first he had both hands on the pan or near the pan. Then Marshal Easling commanded him to surrender. He told him to consider himself under arrest; that he was under arrest and to throw up his hands, and began immediately to advance over the end of the Crow porch toward Mr. Harvey. . . . When he said that Harvey began to back into the door; he went back quickly. . . . Easling fired. I saw Harvey in the act of shooting. I heard two reports and saw the flashes from both Easling and Mr. Harvey; my impression is that Mr. Easling's gun was fired first; always has been my testimony all the way through, and is yet. . . . After those two shots the other persons out there were firing. I saw old man Webber fire; he had a shotgun. I heard Webber say he was hit, then I saw him fire. . . . Quite soon after he (Easling) fired twice out of his revolver, he asked me for this revolver; he said, 'Give it to me'; after I gave him the revolver, he shot Mr. Harvey with it or shot in that direction. I could n't tell how many times. . . . There was a good deal of shooting there in the instant, or minute, or a short time. Those that I saw were all pointed at Rolla Harvey as he stood there in the hallway; they were all pointed in that direction. That is the reason I said in my direct examination, 'I expected to see him fall dead in his tracks at any time'; you could not understand why he was n't killed; they were all shooting at him, that is in that direction."

After Harvey went into the house, the witness went and got a shotgun and, at the direction of Easling, took a position in the street to prevent Harvey from escaping from that side of the house.

This witness also testified:

"I heard Easling say immediately after Milstead fired that last shot, 'Give him the other barrel.'"

In regard to what occurred at the second shooting, Mr. Milstead, the man who fired the fatal shot, testified:

"After Harvey went back into the house, I went from there to my rooms and got a shotgun. I went to go and get a shotgun because Easling told me to go and get a gun, if I ain't mistaken. . . . When I pulled up my gun and shot at him, he stood right there in the hall-

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way. I aimed right at him. . . . When I shot he staggered back and turned into the room out of my sight. My shot was the only shot that was fired at that time. When I fired that shot, Easling was standing right near me. . . . I don't remember whether Easling said, 'Give him the other barrel,' or not. I would n't say positive whether he told me to shoot again or not. I don't recall it if I said 'No, that got him.' I don't recall it if I said it; I would not say that I did not say it.

"During the lull I heard Mr. Easling say; 'Well, I will just shoot in the window once and see if I can raise him.' He did shoot, I could n't say whether he shot into the window or not. I seen the shot up in the kitchen window after that."

"Q. Was there anybody there, either Mr. Harvey or his wife, or those two little babies, in sight of you at the time that shot was fired by Easling into the window? A. They were not."

Referring to what occurred at the time Harvey was killed, he testified:

"I could n't say how long it was after Easling fired that shot before Mrs. Harvey appeared in the hall. . . . I told her to take those children back and go back into the house, or some words to that effect. She did that immediately. She was right at her kitchen door and stepped right back into the kitchen. I did not shoot right at that moment. Harvey was standing right there where I could see him. The next thing that occurred was that I asked him to come out and surrender, once or twice. I don't know whether he heard me or not. He made no reply. I think I said: 'Throw up your hands.' I did n't see him if he started to throw up his hands. I never seen his hand if it was up there so as to protect his body from shot. I think his hands were down at his side. I would not swear positively that they were hanging clear down. I am not positive sure where they were; I don't think they were on his breast, either of them."

On his direct examination the witness Milstead testified that when he asked Harvey to come out and surrender,

"he kind of stepped back this way, dropped his hand like he was going into his pocket. I fired the shotgun. I shot at him at that time because I thought my life was in danger; he had been shooting there and I did n't know but what he would shoot again."

On cross-examination he was asked whether or not he had testified at the coroner's inquest that his instructions were to take Harvey dead or alive, and whether he had not answered:

"The marshal told me that if he can't—if he did n't surrender to shoot him."

His answer was:

"Easling told me that, I believe, yes; yes, I will say yes, 'if he did n't surrender.' I could n't say that he also told me to shoot him regardless

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of whether he resisted or not, I could n't say that he did. I would n't say that he did n't; it has been so long ago."

He had known Harvey probably twenty years.

"During that twenty years I had not personally any knowledge of his ever having shot anybody or committed any felony or stolen anybody's property or been a violent, turbulent man."

Webber, who testified for the defense, said that Easling deputized him to guard the house at the rear, and told him what had happened. From one o'clock in the night until daylight he stood guard alone, except for a short time when O'Donnell and the marshal were there. In reference to his instructions he said, "I kind of think he (Easling) told me to shoot if he (Harvey) did n't surrender."

Easling was dead when the trial took place more than two years after these occurrences. The city offered evidence to show that Harvey bore a reputation of being a turbulent, violent, and dangerous man; that in 1901 he had been convicted of larceny in Wyoming and served a term of two years in the penitentiary there.

The plaintiff introduced witnesses in rebuttal as to the character and reputation of Harvey in the neighborhood where he had resided.

There was a justice of the peace in Bonner Springs, but no warrant had been issued for the arrest of Harvey.

The jury made the following special findings:

"1. What persons were about the outside of the City Hall in Bonner Springs on the night of December 17th, 1913, or in the morning of December 18th, 1913, before the death of Harvey? Webber, Easling, Lawrence, Milstead, O'Donnell.

"2. Did such persons leave their homes and assemble at the City Hall upon the call, order or direction of any one? Yes.

"3. If you answer the last question in the affirmative, upon whose call or order did they assemble there? Easling.

"4. At the time in question, was William G. Easling an appointed, qualified and acting deputy sheriff of Wyandotte county, Kansas? Yes.

"5. For what purpose were said persons called or ordered to assemble at said City Hall? To arrest Rolla Harvey.

"6. Did said Harvey on the night of December 17th, 1913, while in the company of one Rhodes, on Cedar street, in the city of Bonner Springs, assault William G. Easling by shooting at him? No.

"7. Was said Harvey armed with a revolver when he first came out upon the porch of the City Hall on the morning of December 18th, 1913? We think he was.



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"8. Did said Harvey on the morning of December 18, 1913, when informed that he was under arrest or was called upon by the marshal to surrender and throw up his hands comply with such request? The first time he did not, but the last time he did.

"9. Did said Harvey upon being informed that he was under arrest or throw up his hands by said William G. Easling, hold in his hand or produce a revolver and shoot with the same at said W. G. Easling or the persons with him at the time? The first time we think he did, but the last time he did not.

"10. Did said Harvey shoot at or inflict a wound upon one Webber at said time? We think the bullet that struck Mr. Webber possibly was fired by Harvey."

The contention of defendant that it was error to overrule a demurrer to the evidence is argued upon two grounds; first, that the petition fails to state a cause of action under the statute which imposes upon cities and towns a liability for injuries occasioned by the acts of a mob. There was no demurrer to the petition; besides, it stated a cause of action under the statute when it alleged that a large number of persons congregated and assembled at and around the house of the plaintiff and her husband within the limits of the city; that while her husband was coming out of his house at their direction and request, the assemblage of persons unlawfully assaulted him with shotguns and revolvers and caused his death. The second ground upon which it is urged the demurrer was well taken is, that there was no evidence to sustain such a cause of action when plaintiff rested her case. If the petition stated a cause of action under the statute, the evidence was sufficient as against a demurrer, because it tended to prove just what the plaintiff alleged in her petition.

The main contention is that the court erred in not directing a verdict for the defendant. The defendant invokes the well-known rule that where an officer has legal authority to make an arrest, and is using proper means, he may repel force with force; and if the person resisting is necessarily killed in the struggle, the homicide is justified, and a corollary to the same rule to the effect that "duly summoned assistants of an officer are under the same protection of the law that is afforded to the officer who has process in his hands." Many authorities are cited in the brief, holding that where an officer making an arrest for a felony is forcibly resisted he is not limited to such force as is necessary to protect himself from death or great

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bodily harm, but may stand his ground and use such force as is necessary, or apparently necessary, to overcome the resistance offered, even to the extent of taking life.

Other authorities relied upon state the rule as to the power and the rights of an officer in arresting a person who is committing a public offense in his presence, or where a felony has been committed, and the officer has in his possession a warrant for the arrest. The officer in the present case had no warrant, and the jury has found that no felony was committed. There was some conflict in the evidence, but in our opinion there was abundant—perhaps a preponderance—to sustain the finding in favor of the plaintiff, that all that Harvey was guilty of the night before his death was in assaulting the city marshal and knocking him down; and that the only revolver shots on that occasion were fired by the officer himself.

We think it was a question of fact for the jury to determine whether the crowd of men around Harvey's house that morning were acting in good faith in attempting to make his arrest, and killed him in the honest belief that it was necessary to kill or disable him; or on the other hand, as the plaintiff claimed, they formed, during the time of the assemblage, the purpose and intent to take his life, and that in carrying out that purpose he was killed. The court stated the law fairly on these propositions and gave admirable instructions. The jury were told that the burden of proof rested upon the plaintiff to establish that her husband met his death at the hands of a mob; and unless the jury believed from the preponderance of the evidence that her husband was so killed, no recovery could be had against the defendant; and that if the jury believed from a preponderance of all the evidence that the assemblage about his home was without authority of law, but for the purpose and with the intent on their part of doing violence to or injuring plaintiff's husband, or that after having assembled for the purpose, whether lawful or otherwise, they thereafter formed the unlawful purpose of injuring the said Rolla Harvey, and while so assembled they did, or any of them did, inflict injury upon him from which his death resulted, they should find for the plaintiff.

The court charged that the fact that a number of members of a lawfully assembled posse in attempting to effect an arrest

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might act too hastily, or unnecessarily kill a person sought to be arrested within the limits of the city, would not render the city liable for the death; in order that a liability may arise, the posse, after having lawfully assembled, must have abandoned and lost its character as such, and must have become a mob. They were charged that if they found from the evidence that Easling was a deputy sheriff, or city marshal, and that Harvey attempted to shoot him without other provocation than being accosted in the nighttime with an inquiry as to his presence on the street at that time of night, or words to that effect, Harvey was guilty of a felony, and that Easling had the right to arrest him without a warrant, and to call on any citizen or citizens of the county to assist him in making such arrest; and that it was the duty of any citizen or citizens to obey the call and to act under the orders and directions of Easling; and that while so acting they were clothed with the same duties, responsibilities and protection as Easling, and the defendant would not be liable for their acts.

The court also charged that in the face of a resistance, an officer attempting to arrest one who has committed a felony is not required to fall back, but on the contrary is justified and encouraged to press forward and vindicate the law by effecting the arrest or apprehension of the person. In another instruction the jury were told that if they believed from the evidence that the persons present at the time Harvey was killed were there in pursuance of the call of a deputy sheriff for assistance, the presence of citizens so assembled would not constitute a mob as defined by the statute, and that the defendant would not be liable for the acts of such citizens in attempting to arrest or apprehend Harvey,

“even though you should find that the acts of said citizens or any of them were not excusable on the ground of self-defense, or apparent necessity, as hereinbefore explained, and your verdict should be for the defendant, unless you find that after having lawfully assembled, an unlawful intent and purpose was formed, and a mob constituted as hereinbefore defined.”

These instructions state the law contended for by the defendant with respect to the rights of an officer making an arrest without process where a felony has been committed, and the protection afforded by the law to those whom such officer has

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called to his assistance. As already observed, the jury find that no felony had been committed by Rolla Harvey. They may have believed that he was guilty of a misdemeanor or the violation of a city ordinance. Under the instructions of the court and facts which the jury believed were shown by a preponderance of the evidence, they may have found that the assemblage was lawful at first, and that afterwards those assembled united in an unlawful purpose to injure or take the life of Harvey, unless he surrendered. If these facts were true, no member of the assemblage could invoke the rule that he was protected by reason of the lawful purpose for which the assemblage was first formed; nor could the city rely for a defense upon the fact that the assemblage in its original purpose was lawful.

The statute defines a "mob" as "any collection of individuals assembled for an unlawful purpose, intending to injure any person by violence, and without authority of law" (Gen. Stat. 1915, § 3727), and the statute which provides for the punishment of persons participating in unlawful assemblages (Gen. Stat. 1915, § 3674) defines an unlawful assemblage as "three or more persons" who "assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace."

In the quite recent case of *Blakeman v. City of Wichita*, 93 Kan. 444, 144 Pac. 816, it was held that under these statutes it is immaterial what the primary purpose was for which the persons assembled, "if they in fact formed and executed the unlawful purpose after they were brought together." (Syl. ¶ 2.) In that case the city was held liable for the acts of a mob, comprised wholly of persons confined in the city prison, who unlawfully assembled and acted together in assaulting a fellow prisoner in the jail. The opinion quotes from *City of Madisonville v. Bishop*, 113 Ky. 106, 109, the following language:

"The purpose of the assembly, or the aim that it had primarily in view, is not material, if it was in fact riotous or tumultuous, and the city authorities had notice of it and ability to prevent the damage it did." (p. 448.)

The courts have always been jealous, and rightly so, of any attempt to limit unduly the exercise in good faith of the power

and rights the law has conferred upon an officer of the peace in the discharge of his duties; but peace officers, like all other officers, are subject to human frailties and passions; so long as they act with proper motives in seeking to arrest a person charged with an offense, the law protects them and those summoned to assist, even though, acting hastily or upon mistaken judgment, they unnecessarily take the life of the person charged. The fact, however, that the assemblage acts under the color of authority as a posse summoned by an officer will not necessarily and of itself furnish a defense to a city in an action under the statute.

This court cannot declare as a matter of law that the assemblage in the present case was not a mob within the meaning of the statute, because the motive which actuated the assemblage, not only at the time it was assembled, but also until the death of plaintiff's husband was brought about, was a question of fact; and if on this vital issue reasonable minds might draw different conclusions from the evidence, we are bound by the verdict of the jury. It certainly cannot be said that the statute affords no redress in a situation which conceivably might happen, where a deputy sheriff or city marshal, or an assistant city marshal, called together a posse to assist him in making an arrest for a misdemeanor, intending under the guise of such a call to take, and did take, the life of the person charged, on the pretense that he was resisting arrest, or that they or some of them were in danger of being assaulted by him. In some of the large cities of our own country men have been known to conspire with officers to bring about the death of a person whom they desired to get rid of, and, in carrying out such unlawful purpose, to employ the pretense that the person was killed while resisting an arrest. In the bandit wars in Mexico, and, if some of the stories which are told of the present world war are true, it sometimes happens in other countries that prisoners of war have been shot under the specious pretense that they were attempting to escape.

There is some complaint in reference to the rejection of testimony. The court properly limited the cross-examination of plaintiff to matters connected with her testimony in chief. Some of the testimony rejected was hearsay. Besides, none of the evidence concerning which complaint is made was brought

to the court's attention on the hearing of the motion for a new trial. The instructions given, as already observed, presented fairly the issues raised by the defense.

Because of plaintiff's neglect to present a verified claim against the city, it is conceded that she was not entitled to judgment for costs. She should have offered in the lower court to release the judgment for costs before the appeal was taken, and we think it is proper that one-half the costs in this court should be taxed to plaintiff.

The judgment, except as to costs in the court below, is affirmed.

JOHNSTON, C. J., MARSHALL and DAWSON, JJ., dissent.

No. 20,968.

T. H. GRIFFITH, *Appellant and Appellee*, v. THE CITY OF WICHITA, *Appellee*, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, and THE WICHITA UNION TERMINAL RAILWAY COMPANY, *Appellants*.

SYLLABUS BY THE COURT.

1. **DAMAGES**—*Obstructing Access to City Property—Instructions—Findings.* In an action for damages for the obstruction of access to property based on but one ground, it was error to permit proof of another ground and to give instructions and submit findings pertaining thereto, but as the jury separated the amounts allowed on account of each, the error was rendered practically harmless as that part of the judgment might have been eliminated.
2. **SAME**—*Elements of Damages—Instructions.* Damages were permitted to be proved on the basis of the plaintiff's right to occupy a part of a certain street, but this proof was eliminated by an instruction given and the error, if any, was thereby neutralized.
3. **SAME**—*Special Questions—No Error in Submission.* Certain special questions, which the defendants assert were not within the range of the testimony, were submitted, but having been answered in accordance with inferences fairly to be drawn from physical facts shown by the record no error in their submission is disclosed.
4. **SAME**—*Joint Liability of Defendants.* The finding that one of the defendants rearranged certain railroad tracks, thereby obstructing travel in the street, did not relieve the other defendant from responsibility therefor in view of another finding to the effect that such rearrangement was a part of the general enterprise in which they were both engaged.

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5. *SAME—Inconsistent and Contradictory Findings.* The jury expressly found that a certain depression in one street rendered the passage of teams and vehicles thence into another street impossible, and by another finding stated with equal perspicuity that notwithstanding such depression it would have been practicable for teams, wagons and other vehicles to pass from the one street into the other. *Held*, that such inconsistent and contradictory findings cannot be permitted to stand.
6. *SAME—Cause of Damages as Alleged Not Proven.* It appearing from the entire record and from the testimony of the plaintiff himself that the cement wall complained of as a barricade did not have the effect to increase the obstruction to travel, it is held that the plaintiff cannot recover on account of the erection of such wall.
7. *SAME.* From the location of different avenues of approach shown by the record and from the space in the street occupied by the plaintiff with a platform or a loading dock in front of his own buildings, it is held that he is not shown to have been damaged by the rearrangement of railroad tracks complained of.
8. *SAME—Claim against City—Not Filed in Statutory Time.* The claim for damages not having been filed with the city clerk in the time required by the statute, the judgment in favor of the city must for this reason, regardless of others, be affirmed.

Appeal from Sedgwick district court, division No. 2; THORNTON W. SARGENT, judge. Opinion filed December 8, 1917. Affirmed in part and reversed in part.

*S. B. Amidon, D. M. Dale, and S. A. Buckland*, all of Wichita, for appellant and appellee T. H. Griffith.

*William R. Smith, Owen J. Wood*, both of Topeka, for appellant The Atchison, Topeka & Santa Fe Railway Company; *R. R. Vermilion, Earle W. Evans, Joseph G. Carey, and W. F. Lilleston*, all of Wichita, for appellant The Wichita Union Terminal Railway Company.

*O. A. Keach, and Robert C. Foulston*, both of Wichita, for appellee The City of Wichita.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued the railway company, the terminal company and the city of Wichita for obstructing the ingress to and egress from his two wholesale houses fronting on Fifth avenue and recovered a judgment for \$4,000 against the two companies, the verdict being in favor of the city.

Douglas avenue is intersected by Fifth avenue near the union

station, and the plaintiff's buildings are located on four lots, each 25 feet wide, the southern line of which tract is about 300 feet north of Douglas avenue. In the construction of the Douglas avenue subway as a part of the union station enterprise, a depression was made which the jury found would have prevented teams and vehicles from passing from Fifth street upon Douglas avenue or from the latter upon the former. The depression was about a foot in depth, and there was a concrete curb put in from the south edge of the sidewalk to the street bed. But the jury also found that but for a certain wall across the south end of Fifth avenue, "It would have been practicable for teams, wagons and other vehicles to pass from Douglas avenue into Fifth avenue and from Fifth avenue into Douglas avenue."

This wall was of cement, about 19 feet long, one foot thick and five or six feet high and was located against the north side of the sidewalk along the north line of Douglas avenue. Certain railroad tracks along Fifth avenue were rearranged to accommodate the condition brought about by the construction of the union station. The statement of facts in *Campbell v. City of Wichita*, 101 Kan. 817, is referred to for the general features of the situation.

The petition alleged:

"That the said property was accessible from the east by Fifth avenue, and from the west by an alley in the rear of said building; that on the 4th day of April, 1914, these defendants and each of them did entirely close up Fifth avenue and did erect at a point where the same intersects Douglas avenue a large blockade, to wit: a cement wall several feet high, and entirely close the said street and render useless the same as a street or highway, . . . and that by the erection of the said barricade as aforesaid the same wholly impaired and destroyed said Fifth avenue and rendered it wholly useless as a public highway and by said obstruction the plaintiff has been deprived of all means of ingress and egress to and from his said premises from the east end thereof. . . . That by reason of the action of the said defendants and each of them in closing up and permitting the closing of said street, this plaintiff has been damaged in the sum of fifteen thousand (\$15,000) dollars. Plaintiff further alleges that . . . he filed with the said clerk of the city of Wichita . . . a claim against said city of Wichita to the specific injury aforesaid. . . ."

One of the instructions requested by the plaintiff was:

"The jury are instructed that if you believe from the evidence in this case that the property of the plaintiff described in the petition has been



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depreciated in value by reason of the erection and construction of the wall or bulwark in question, then you are instructed that the plaintiff is entitled to recover the amount of the depreciation in value so sustained by it to the property aforesaid as shown by the evidence and you will assess such sum as will compensate plaintiff for the depreciation in value so sustained."

Yet the court below, over the persistent objections of the defendants, permitted the plaintiff to introduce a large volume of testimony as to the damage claimed to have been caused by the rearrangement of the tracks, and this feature is prominent also in the instructions and in the special findings.

In answer to this assignment of error it is suggested, among other things, that the claim filed with the city clerk was set out and made a part of the petition and contained the averment, "and the street has been entirely filled by said railway companies and the street is entirely blocked, and claimant is entirely shut off from using said property for said purposes."

But the entire pleading is susceptible to the one construction only—that the plaintiff relied on the wall as the sole ground of recovery. It was error therefore to receive the testimony and not to omit the instructions and findings touching the rearrangement of the tracks as an element of damage, for the all-sufficient reason that the plaintiff had not pleaded it. The jury, however, were asked to and did separate the amount of their verdict into \$2,500 on account of the wall and \$1,500 for the rearrangement of the tracks, and the error as to that part of the judgment might have been rendered harmless by elimination.

It is complained that the court permitted damages to be proven on the basis of the plaintiff's right to occupy a part of Fifth avenue with his dock, but by the instructions this was eliminated and the error, if error it was, thereby lost its sting.

The court is criticised for submitting of its own motion certain special findings concerning which it is said there was no testimony. But if there was no direct evidence there were physical facts from which certain inferences as to the wall (about which most of these questions were asked) might be drawn, and no error in this respect is disclosed.

The terminal company urges, that as the jury found that the tracks were rearranged by the Santa Fe, this of necessity relieved the other company from liability therefor. But they

also found that this rearrangement was part of the general scheme of elevation. Hence, no error.

In the motions for new trial each of the defendant companies complained that the special findings were inconsistent with one another. One of the nineteen assignments of error is the overruling of the motions for a new trial. It cannot be possible that the depression in Douglas avenue, as already described, did and at the same time did not prevent the passage of teams and vehicles from one street into the other, and yet the jury deliberately found both ways on this point. One of two results must inevitably follow: Either the erection of the wall did not destroy the plaintiff's ingress and egress because they had already been destroyed, or else the two defendants are required to pay \$4,000 because they did, although they did not, obstruct the plaintiff's ingress and egress by the erection of the wall. This sort of Janus-faced findings will not do.

The plaintiff himself testified that for fifteen years before the construction of the wall Fifth avenue was like any other street in Wichita, except that the Santa Fe had one or two tracks extending down the street to a certain point and then veering to the southeast toward the old depot, making the street clear of tracks south of the Potts warehouses and that—

"There was a cement wall built across Fifth avenue at the intersection of Douglas avenue, shutting off all traffic by teams on Fifth avenue."

"Tracks were set very closely together and extended directly down to Douglas avenue, cutting out this slant that I have previously described, thereby closing the street entirely."

In another place, on cross-examination, he testified, when asked as to the depreciated value of his property:

"I think the concrete wall was the last straw. That is what did the business. I think that was the culminating thing that ruined my property."

As to the depression in Douglas avenue he testified:

"I think it was depressed about a foot or a little more. There was a concrete curb put in from the south edge of the sidewalk to the street bed, and it is in there now. . . . If there was no provision made for bridging it would cut off the driving of teams from Douglas avenue up into Fifth avenue. The fact that the curbing was put in from the edge of the sidewalk down to the street bed would indicate there was no provision for a driveway from Douglas avenue up to Fifth avenue. There was no driveway put in there to my knowledge."

In view of this evidence and one of the findings of the jury, both of which are clear, to the effect that entrance upon Fifth avenue from Douglas avenue with teams and vehicles was completely obstructed, regardless of the concrete wall and regardless of the change in the tracks on Fifth avenue, it is impossible to see how the building of the wall or the changing of the tracks accentuated the fact which already existed or added anything to what was already a complete practical obstruction of ingress and egress.

The jury found that at the time of the wrongs complained of in the petition—

“There was and has ever since been a public and dedicated street thirty-five feet wide situated between the plaintiff's property and Douglas avenue, and extending west from Fifth avenue to and intersecting with an alley or passageway running north past plaintiff's property to First street.”

Also that—

“There has ever since been a dedicated and public alley fifteen feet wide, extending north from Douglas avenue to and intersecting with this thirty-five foot street.”

The blueprint set out in the abstract shows plainly that there is a fifteen-foot alley running north about 137 feet from Douglas avenue one-half block west of the wall in controversy, there entering the street thirty-five feet wide running east to Fifth street, and an alley twenty feet wide running north to First street, so that the only obstruction the wall in question could have caused, aside from the depression in Douglas avenue, would be to divert the travel one-half block west; whence by going 137 feet north there would be access by a street thirty-five feet wide east to Fifth avenue, thence north by the plaintiff's property. It would seem from the opening statement and from the plaintiff's testimony that he claims to have been injured by additional tracks being laid in the street east of his property, but it is undisputed that the plaintiff himself built a dock or platform ten feet wide east of his buildings on what would be the sidewalk if there was one in Fifth avenue, no part on his ground, as he testified himself:

“That dock is built of stone and brick and has piers of white oak, I think, in it, and the surface of it is two-inch oak so that it makes a permanent structure there. The Santa Fe tracks are east of this dock.

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. . . I did not use Fifth avenue for the purpose of driving teams up to the east edge of my dock. Just to get the freight out of the cars or to get it into the cars."

In view, therefore, of the plaintiff's own obstruction of Fifth avenue and the other matters already referred to, it is impossible to see how he can rightly claim damages for the rearrangement of the tracks or the erection of the concrete wall.

The plaintiff appeals from the judgment in favor of the city, but as the jury found on sufficient evidence that the claim for damages against the city had not been filed in time, the judgment in favor of the city must for this reason alone be affirmed. (*Campbell v. City of Wichita*, 101 Kan. 817, 168 Pac. 833.)

The judgment against the other defendants is reversed with directions to enter judgment in their favor.

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No. 20,992.

J. J. WALSH, *Appellant*, v. THE KANSAS FUEL COMPANY,  
*Appellee*, and W. H. BARRETT.

## SYLLABUS BY THE COURT.

1. MINING COAL—*Unambiguous Contract—Construction—Matter for the Court.* Where a contract is not ambiguous, and there is no charge of fraud, accident, or mistake, the intention of the parties must be ascertained from the contract, and its construction is a matter of law for the court and should not be submitted to the jury.
2. SAME—*Subsidence of Surface—Damages—Statute of Limitations.* An action for damages caused by the subsidence of the surface of land, brought about by mining coal therefrom, is not barred by the statute of limitations until two years have elapsed after the surface has subsided.
3. SAME—*Judgment—Supported by Evidence.* There was evidence which tended to show that the surface of the land had subsided in 250 or 260 different places within two years prior to the commencement of this action, and there was also evidence which tended to show the decrease in the value of the surface of the land caused by the subsidence of that surface.

Appeal from Wilson district court; JAMES W. FINLEY, judge. Opinion filed December 8, 1917. Reversed.

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*C. A. McNeill, Maurice McNeill*, both of Columbus, and *P. C. Young*, of Fredonia, for the appellant.

*Al F. Williams, S. L. Walker*, both of Columbus, and *W. R. Thurmond*, of Kansas City, Mo., for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: In this action the plaintiff seeks to recover damages for the subsidence of the surface of real property, caused by mining coal therefrom. Judgment was rendered in favor of the defendants, and the plaintiff appeals from the judgment in favor of the Kansas Fuel Company.

Under a lease, the Kansas Fuel Company mined coal from land owned by the plaintiff. Mining operations under that lease were commenced in 1903 and continued until about April 1, 1912. After the coal had been taken from the land, portions of the surface thereof subsided, or caved in. The cave-ins occurred repeatedly from the beginning of mining operations until the commencement of this action. This action was brought to recover damages for all the cave-ins that had occurred within twenty months prior to April 20, 1912.

1. Complaint is made of an instruction in which the court told the jury that the plaintiff's intention to waive subjacent support was a question of fact for them to determine from the lease, acts and conduct of the parties in relation thereto. That instruction was as follows:

"You are instructed as a matter of law that the owner of real estate who leases the same for mining purposes, nevertheless has the right to subjacent support of the surface. And he will not be deemed to have waived, conveyed or lost such right, unless it appears from the language used in the lease or conveyance that it was the intention to convey that also. The matter of construing a contract or other written instrument is a matter to be disposed of by the court; and you are instructed that according to the terms and condition of the mining contract or lease entered into between the plaintiff and defendant W. H. Barrett, it does not clearly appear to have been the intention of the plaintiff J. J. Walsh to convey his rights to the subjacent support to the surface of the land leased. The question as to whether or not such was his intention is a question of fact for you to determine from the lease and the acts and conduct of the parties in relation thereto at the time of making and subsequent thereto. Should you believe from all the evidence that it was the intention of the plaintiff Mr. Walsh to convey the right to subjacent support to the surface, then and in such an event he can recover nothing

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in this action, and your verdict should be for the defendants. And in determining the intent of Mr. Walsh at the time the lease was made, you have the right to take into consideration all his subsequent acts and conduct in relation thereto as shown by the evidence, and determine therefrom what his intention may have been at the time the lease was made. Or if you should believe that Mr. Walsh knew, at the time of the making of the lease, that the coal could not be successfully removed from his land without destroying the subjacent support to the surface, then and in such an event you should return a verdict in favor of the defendants."

The last half of the instruction is the part of which complaint is made. The complaint is well founded. The intention of Walsh was expressed in his contract, and unless that contract was ambiguous no evidence was admissible to alter, vary or contradict any of its terms; and the question of the intention of the parties, at the time the contract was signed, should not have been submitted to the jury. In *Walsh v. Fuel Co.*, 91 Kan. 310, 137 Pac. 941, a former appeal in this action, this court said:

"Where the owner of land retains the surface estate and conveys the estate in minerals thereunder, he may convey or waive the right of subjacent support for the surface, but such conveyance or waiver should not be implied unless the language of the instrument of conveyance is appropriate therefor and clearly indicates such to be the intention of the parties to the conveyance." (Syl. ¶ 2.)

And in the opinion said:

"The contract in this case is not ambiguous in the usual sense." (p. 313.)

To show that the plaintiff waived subjacent support, the Kansas Fuel Company relies on the following language contained in the lease:

"Said second party to work and mine said coal in a good, careful, and workmanlike manner, and not leave unnecessarily any coal which should be and can be mined with safety to the mine and miner, and said second party shall not be required to work low places or rolls which cannot be mined except at a loss."

The language quoted does not clearly indicate any intention on the part of the plaintiff to waive the right to subjacent support for the surface of the land. That question was disposed of on the former appeal.

The instruction was misleading and should not have been given. The terms of the lease cannot in any way be altered, varied, or contradicted, except for fraud, accident, or mistake.

None of these things was alleged, and no attempt was made to prove any of them.

2. Another complaint is made of the following instruction:

"You are instructed that in estimating the damages that may have occurred within the two years as heretofore pointed out, you are not to count the damages from the time you may have found the cave-ins to have occurred, but you are to count the damage on from the time when the coal may have been removed. Therefore, you are instructed that if you find for the plaintiff, he can only recover for the damages to such portion of the land as to which the coal may have been removed within the two years next preceding April 20, 1912."

The instruction was erroneous. In *Audo v. Mining Co.*, 99 Kan. 454, 162 Pac. 344, it was held that a cause of action for damages caused by the subsidence of land into excavations made by a mining company did not accrue until the land subsided. It is only just to say, however, that the present action was tried before the opinion in the *Audo* case was handed down.

Complaints are made of other instructions, but they are not deemed of sufficient importance to require special attention.

3. The Kansas Fuel Company attempts to answer the complaint concerning the instructions by arguing that there was no evidence to show the number of cave-ins that had occurred within two years, or within twenty months, prior to the commencement of this action, and by arguing that there was no evidence to segregate the damages caused by the cave-ins that had occurred within the two years or twenty months prior to the commencement of this action from the cave-ins that had occurred during the entire period covered by the mining operations of the fuel company. On the contrary, the abstract shows that there was evidence which tended to prove that 250 or 260 cave-ins had occurred within the periods named. The abstract also shows that there was evidence which tended to prove the value of the land at the beginning and at the end of those periods. That evidence also tended to show that the value of the land had decreased materially during that time, and that the decrease in value had been caused by the cave-ins.

The judgment is reversed and a new trial is directed as to the Kansas Fuel Company.

No. 21,038.

**HARBOR BUSINESS BLOCKS COMPANY, *Appellant*, v. ELIZABETH GREGORY, *Appellee*.****SYLLABUS BY THE COURT.**

1. **EVIDENCE—*Affidavits—Notice of Their Intended Use on Trial—Service on Nonresident.*** Under section 350 of the civil code, which authorizes the use of affidavits as evidence under certain limitations, and provides that copies of such affidavits must be served upon the adverse party or his attorney at least ten days before the trial, service of copies of affidavits is sufficiently made when they are delivered to the adverse litigant personally, at his principal place of business, even although that may be outside the state.
2. **DEEDS—*Deposited in Escrow—Rescission of Contract—Fraud—No Title Passes.*** When deeds to real estate are deposited in escrow, to be delivered to the grantee upon completion of payment therefor, the title to the property does not pass unless full payment is made; and where the grantee has a good defense to an action for the balance due on the purchase price, based on the fraud and misrepresentation of the grantor, and rescinds the contract of purchase, no formal offer to reconvey the property is required.

Appeal from Jewell district court; **RICHARD M. PICKLER**, judge. Opinion filed December 8, 1917. Affirmed.

*David Ritchie*, of Salina, for the appellant.

*D. M. McCarthy, J. R. White*, both of Mankato, *F. W. Mahin*, and *I. M. Mahin*, both of Smith Center, for the appellee.

The opinion of the court was delivered by

**DAWSON, J.:** The plaintiff, a corporation doing business in California, brought this action against the defendant to recover on six promissory notes executed by her as part payment for certain town lots in Contra Costa county, California, on the east side of San Francisco Bay. The sale of the lots to defendant was effected through the fraud and misrepresentation of plaintiff's agents. It would serve no purpose to give the details of the swindle. Let it suffice to say that it was of that familiar, high-handed type which prompted the Golden State to enact its blue sky laws and its more recent legisla-



tion for the licensing and bonding of reputable real-estate agents and for the suppression of all others.

The defendant answered, setting up fraud and misrepresentation, and in a cross-petition demanded the return of certain moneys paid by her to plaintiff on account of these town-lot transactions. She prevailed.

Plaintiff appeals, and urges as error the admission in evidence of certain affidavits filed by defendant. These affidavits were procured in California by one of defendant's attorneys who went to that state seeking evidence touching the swindle which had been perpetrated on his client. His mission was remarkably successful. Several persons who knew the facts, even some who had helped to perpetrate the fraud upon Mrs. Gregory, made affidavits. These were forwarded to Jewell county, Kansas, to be filed in court as provided by statute (Civ. Code, § 350, Gen. Stat. 1915, § 7254), and upon being apprised by a telegram from his associate counsel that the affidavits were on file, the attorney who gathered the affidavits promptly served copies of them upon the plaintiff at its principal office in San Francisco.

The statute authorizing this sort of evidence reads as follows:

"An affidavit may be used to verify a pleading, prove the service of a summons, subpoena, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, or in any other case permitted by law. Affidavits may also be used on the trial of an action subject to the following conditions: The affidavit shall be filed in the office of the clerk of the court and a copy thereof served on the adverse party or his attorney of record at least ten days before the day of trial. If within five days after such service the adverse party gives notice in writing that he desires to cross-examine the witness whose affidavit has been filed, or that he denies the truth of the matter stated in such affidavit, such affidavit shall not be admitted in evidence but the testimony of the witness must be given orally or by deposition. If such notice be not given, the affidavit may be read in evidence at the trial. The court may tax the costs of the attendance or deposition of any witness against a party who needlessly or unreasonably causes such costs." (Civ. Code, § 350.)

It is contended that since the statutes of this state have no extraterritorial effect, the service of copies of the affidavits on plaintiff personally in San Francisco was without effect. Counsel for plaintiff frankly admit that they can find no decided

case supporting their view of closer analogy to the one at bar than that of *The State v. Simmons*, 39 Kan. 262, 18 Pac. 177, where it was held that an attachment issued out of a Kansas court did not authorize a Kansas sheriff to arrest delinquent witnesses in another state and to bring them into the jurisdiction of the state and district court. That question and the one at bar are widely different. Service upon an adverse party to a lawsuit of a copy of an affidavit, motion, or the like, which has been filed in a pending case, is not in any strict sense a writ or process of a court. If it be treated as a process at all, it is but a minor and informal one; it is not an initial process such as is necessary to institute an action. It will be noted that in initial processes like the service and return of summons the code descends into details, while no such particularity is specified in the matter of service of notices of motions, the filing of affidavits, and the like. The court holds that the statute authorized the service of the copies of the affidavits upon the adverse party personally, no matter where it might reside.

It is argued that cases may arise where the adverse litigant might reside so far away from the court where his cause was pending that it would be impossible for him to give notice within five days of his desire to cross-examine the witnesses who made the affidavits. That class of cases can readily be dealt with in the exercise of the trial court's judicial discretion as they arise, and doubtless the trial court would continue the case where justice required it so that the witnesses could be cross-examined. That is what the court did in the case at bar. When the sufficiency of the service of copies of the affidavits upon the plaintiff in San Francisco was challenged, the trial court continued the cause so that the depositions of the witnesses might be taken formally, and they were so taken.

Another error urged by plaintiff was based upon the insufficiency of defendant's tender of the return of the papers, deeds, etc., deposited in escrow in San Francisco, to effect a rescission of the contract. It is insisted that a reconveyance of the town lots by defendant was necessary. We think not. The deeds to the property were not delivered to defendant. They were not to be delivered to her until she had paid the promissory notes sued on in this action. The conditions of the escrow

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so provided. The title did not pass, and hence no formal reconveyance by deed was required. (*Roberts v. Mullenix*, 10 Kan. 22; *Pomeroy v. Insurance Co.*, 86 Kan. 214, 120 Pac. 344.) (See, also, *Baker v. Snavely*, 84 Kan. 179, 114 Pac. 370; 16 Cyc. 578; 10 R. C. L. 627, 628.) Under the circumstances of this case, even if there had been no conditional deposit of the deeds in escrow but a direct delivery to the defendant, her written notice to plaintiff, repudiating and rescinding the contract for fraud and deceit and offering "to do all things necessary to effect the return to you of the deeds," etc., "together with all things of value received by me in such transaction," was sufficient. (*Thayer v. Knote*, 59 Kan. 181, 52 Pac. 433; *Klingman v. Gilbert*, 90 Kan. 545, 554, 135 Pac. 682.)

The judgment is affirmed.

No. 21,057.

BERTRAM BRICE-NASH, *Appellant*, v. THE HUTCHINSON INTER-URBAN RAILWAY COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Action Dismissed—New Action Begun—New Causes of Action—Statute of Limitations.* A plaintiff whose action is disposed of otherwise than on the merits cannot in a new action brought within a year engraft causes that are barred upon causes pleaded in the first action that are not barred.
2. SAME. Herein it is held that the cause of action stated in the second action is substantially the same as that pleaded in the first.
3. SAME—*Findings Contrary to Evidence—New Trial.* A verdict of the jury must be set aside where special findings material to its support are determined by the court to be contrary to the evidence.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed December 8, 1917. Affirmed.

E. L. Burton, of Parsons, and Harry Brice, of Cimarron, for the appellant.

C. M. Williams, and D. C. Martindell, both of Hutchinson, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action to recover damages for personal injuries sustained by the plaintiff while riding on one of defendant's street cars. The verdict of the jury in favor of the plaintiff was set aside by the court and a new trial granted, from which order the plaintiff appeals.

The accident occurred on Main street in Hutchinson, Kan., where the defendant maintains a double-track railway. On October 4, 1911, plaintiff was riding on a street car going north, which was about to stop at a crossing, and plaintiff's arm protruding from a window was struck by a car going south on the other track. He began an action on February 16, 1912, to recover for the injury, which was dismissed on January 15, 1915. The present action to recover damages was brought on October 25, 1915.

In the first action plaintiff alleged as grounds of negligence the nearness of the tracks; the insufficiency of the clearance between the cars on the tracks; that the windows were not screened, but only protected by bars five inches apart; and that a violent jerk of the car pushed his arm between the bars, and it was caught and crushed by the passing car. In the last petition the negligence alleged was the nearness of the tracks; the insufficiency of the clearance between the cars; the roughness of the tracks at the place of the accident; the violent checking of the speed of the car, which threw his arm out of the window; and that the bars across the window were not of sufficient height to keep the arms of passengers from projecting over them. He also added that the motorman on the south-bound car had time and opportunity to have seen the plaintiff's arm and realized his peril before his car caught the plaintiff's arm.

On the trial the following special findings of fact were made:

"Q. 1. If you find that the defendant was negligent in this case, how and in what manner was defendant negligent? A. Cars too close together and bars on windows not high enough.

"Q. 2. If you find that the defendant was negligent then what acts of defendant constituted the negligence so found by you. A. By not properly maintaining their track and not properly barring their windows.

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"Q. 3. Did the defendant have the windows of the car in which plaintiff was riding properly guarded by iron bars across said windows? A. No.

"Q. 4. If you answer the last question in the negative then in what respect were said windows not properly guarded? A. By bars not being high enough."

On motion of the defendant the court set aside findings 1 and 2 because they were not sustained by the evidence, and then granted a new trial of the cause. In the ruling the court stated that the new trial was granted upon the ground that the jury had based its findings upon negligence which was not an issue in the case, and for which the defendant could not be held liable under the issues in the present action.

The plaintiff appeals and insists that the ground upon which a new trial was granted was not tenable. He insists that the language of the court in the ruling indicated that the new trial was granted on the theory that the verdict was based on negligent acts not pleaded in the first action—that the new acts of negligence pleaded were barred by the statute of limitations. However that may be, the verdict of the jury could not be allowed to stand. The court decided that finding 2 was contrary to the evidence, and as findings 3 and 4 involved the same element it necessarily follows that these findings are also without sufficient support. If there was no evidence to support finding 2—that the defendant did not properly bar its windows—there was not sufficient evidence to support findings 3 and 4—that the windows were not properly guarded by iron bars across them, and that the bars were not high enough to afford protection. These were important findings, and being contrary to the evidence, the court could do no other than to set the verdict aside.

Under the pleadings it can hardly be said that a new and distinct ground of recovery was stated in the last petition. It is true that a plaintiff whose action is disposed of otherwise than on the merits cannot in a new action brought within a year engraft causes that are barred upon those pleaded in the first action which are not barred. The causes of action pleaded in the second case must be substantially the same as those in the first. Here the second was substantially the same as the first. In both there were averments of defects in the tracks, insufficiency of clearance, violent checking and jerking of the

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car by which the arm of plaintiff was thrust through a window that was insufficiently protected. In one case the lack of protection was spoken of as the absence of a screen, and in the other it was said that the windows were not properly guarded by bars. The protecting or screening of the windows by iron bars may be said to be substantially the same as screening them with wire. The important element in this branch of the case is the protection of passengers sitting near windows as against injuries from the outside. According to the pleadings there were several negligent acts and omissions of the defendant which contributed to the accident. The closeness of the cars, the tilting of them towards each other on account of the defects in the tracks, and the violent checking and jerking of the cars, which it is alleged pushed the plaintiff's arm through a window, all together contributed to the result, and yet it may be inferred that the injury would not have been sustained if there had been proper protection at the windows. It may be difficult for plaintiff to recover if it is made to appear that he voluntarily put his arm through the unprotected window as defendant claims, but he is contending that his arm was thrust through the window by the negligence of the defendant. The trial court was not justified in treating the averments in the petition respecting the absence of protection in the windows as a different ground of liability from that alleged in the former petition, and therefore barred by the statute of limitations; but having found that the findings relating to the failure to protect the windows were not supported by the evidence, the court could not uphold the verdict.

The judgment is affirmed.

No. 21,068.

WILLIAM STORM and EMMA STORM, *Appellees*, v. THE LEAVENWORTH LIGHT, HEAT AND POWER COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. **ELECTRICITY—Uninsulated Wires—Contact with Boy—Death—Negligence for Jury.** Following *Snyder v. Light Co.*, 98 Kan. 157, 157 Pac. 442, it is held that where a company transmits high-voltage electricity along the streets of a city by wires on which insulation is not maintained, the question whether it ought to anticipate that loose wires, or other articles capable of serving as a conductor, might come in contact with its lines, so as to endanger persons on the street or sidewalk, is a question of fact to be determined by the court or jury trying the case in which it arises.
2. **SAME—Duty of Company to Anticipate Danger—Instruction.** An instruction which taken alone might seem to indicate that as a matter of law the company was bound to such anticipation held not to have been prejudicial because of other explicit instructions covering the matter.
3. **SAME—Evidence—Finding.** A finding of fact held to have been supported by the evidence.
4. **SAME—Finding Not Supported by Evidence.** A finding to the effect that a loose wire had been in contact with the wires of an electric-light company so long that it ought to have discovered it before the occurrence of an accident, held not to have been supported by the evidence, but to have been nonprejudicial.
5. **SAME—Finding of Negligence Construed.** A finding that the company's wires would not have injured any one using the streets in an ordinary way, or in a way reasonably to have been foreseen, held not to mean that the throwing of a loose wire across them could not have been anticipated by the exercise of ordinary caution.

Appeal from Leavenworth district court; JAMES H. WENDORFF, judge. Opinion filed December 8, 1917. Affirmed.

*Floyd E. Harper*, of Leavenworth, for the appellant.

*W. W. Hooper*, and *Lee Bond*, both of Leavenworth, for the appellees.

The opinion of the court was delivered by

MASON, J.: George Storm, a boy fifteen years of age, was killed by electricity from the wires of the Leavenworth Light, Heat and Power Company, the contact being brought about through a small loose wire, with a stone upon the end of it,

which had been thrown over wires some thirty feet from the ground. His father sued the company, alleging that the boy's death was caused by its negligence in not keeping up the insulation. The plaintiff recovered a judgment, and the defendant appeals.

1. Mrs. Snyder, a neighbor, who undertook to assist the boy, was herself severely injured by the shock received through coming in contact with his body. She recovered a judgment against the company, which was affirmed on appeal. (*Snyder v. Light Co.*, 98 Kan. 157, 157 Pac. 442.) The questions of law now presented are largely the same as were passed upon by the court in that case. The defendant maintains that it cannot be held liable for the injury, notwithstanding its omission to keep up the insulation on its wires, because the occurrence was one which it could not reasonably have anticipated. This matter was fully considered in the Snyder case, where the decisions bearing thereon were reviewed at length, the conclusion being reached that whether the company should have anticipated such a result from the lack of insulation was fairly a question for the determination of a jury. Upon this proposition it is only necessary to say that we adhere to the view there expressed.

2. The contention is also made that the trial court took from the jury the question whether the defendant ought to have anticipated the injury, by instructing that it was bound to anticipate that wires or conductors of electricity might be thrown over or come in contact with its lines. Considered by itself the instruction referred to may have been open to this construction. But the jury were explicitly told that the defendant was bound to anticipate such combinations of circumstances and injuries as it might reasonably forecast as likely to happen, taking into account its own experience and that of others, together with what was inherently probable; that the defendant was not liable if it could not reasonably have forecast that such an accident as the one complained of was likely to happen, nor if it could not reasonably have expected that any one would come in contact with its wires. The instructions were substantially the same as in the Snyder case, and taking the charge as a whole we think there is no substantial likelihood of the jury having been misled.



3. The jury were asked whether the defendant's wires which were used for house-lighting purposes were maintained in the manner usual in the case of wires used for similar purposes under like conditions by the federal government and electric light companies in the cities, and if not, in what respect there was a difference. They answered "No." "Not maintained by proper insulation." It is contended that there was no evidence to support these answers. There was abundant evidence that the defendant's wires were originally covered with insulating material, but that in many places, including that where the loose wire lay across them, it had long since worn off and was hanging in strips. A witness who testified that he was an electrician said that at Fort Leavenworth the wires carrying 2,300 volts (the amount carried by the defendant's light wires) had rubber insulation; that he knew of no place in cities outside of Leavenworth where bare wires were used to carry 2,300 volts—that such was not the case in Kansas City. Other evidence was introduced contradicting this testimony, but there was sufficient evidence to support the findings referred to. The question was also asked whether the federal government and electric light companies in other cities used bare wires under similar conditions. The jury replied that they did not know. The objection is made that there was undisputed evidence requiring a negative answer. As already indicated, there was some conflict on the general subject, and the credibility of the testimony referred to, even if not specifically contradicted, was for the determination of the jury.

4. A finding was made to the effect that the wire which hung across the company's wires had been in that position a sufficient length of time so that the defendant ought to have learned that it was there previous to the accident in question. This is also attacked as without support in the evidence. There was some testimony tending to show that George Storm himself threw the small wire over those of the company just before he received the shock, but the witness who gave it was shown to have made contradictory statements, and the jury were justified in finding, as they did, that such was not the fact. Outside of this evidence there was nothing to indicate how long the wire had been in the position in which it was found after the boy's death. The statement of the jury that it had been

there long enough for the company to have discovered it in time to prevent the accident is therefore unsupported. It cannot be assumed, however, that the verdict was affected by this finding, for no such issue was made by the pleadings or submitted in the instructions. The contention of the plaintiff throughout was that the defendant was negligent in failing to have its wires insulated—not in failing to discover the small wire after it had been thrown across the wires carrying the current. The verdict must be deemed to respond to the issue presented, notwithstanding an unsupported finding on a question not involved. (*Saunders v. Railway Co.*, 95 Kan. 537, 148 Pac. 657.)

5. The defendant maintains that judgment in its favor is required by a special finding consisting of the following question and answer:

“Would the wires of defendant have injured any person using the street about them, on the day in question, if said person or persons had used said street in the way that streets or sidewalks are ordinarily used or as reasonably prudent people would foresee that they would be used? No.”

If this is interpreted as meaning that the injury would not have occurred if nothing had taken place in the street that could not have been foreseen by reasonably prudent people, it is inconsistent with the verdict. But such an interpretation should not be adopted if any other is fairly open. The question seems to refer to the use of the streets and sidewalks as such, and does not in terms or by any clear implication relate to the throwing of anything across the electric wires. It seems probable that the jury understood that they were asked to say whether the uninsulated condition of its wires could by itself have occasioned injury to drivers of vehicles or pedestrians who were using the streets in the ordinary way. A negative answer to the question as so construed would of course be consistent with the general verdict.

The judgment is affirmed.

No. 21,080.

BELLE HOLCOMB, *Appellee*, v. CLIFTON TOWNSHIP, *Appellant*.

## SYLLABUS BY THE COURT.

NEGLIGENCE—*Defective Guard-rails on Township Bridge—Personal Injuries—Evidence—Judgment.* In an action to recover for injuries alleged to have been occasioned by defective guard-rails on a township bridge, it is held that the record fails to disclose prejudice or passion on the part of the jury, and the findings being sustained by evidence showing that the plaintiff was without fault, that the guard-rails were insufficient, that this was the proximate cause of plaintiff's injuries, and that the township trustee had due notice of the defect, a judgment against the township cannot be disturbed.

Appeal from Wilson district court; JAMES W. FINLEY, judge.  
Opinion filed December 8, 1917. Affirmed.

*W. H. Edmundson*, and *Miles E. Canty*, both of Fredonia, for the appellant.

*S. C. Holmes*, *S. C. Holcomb*, both of Yates Center, and *P. C. Young*, of Fredonia, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff recovered judgment against Clifton township, in Wilson county, for damages resulting from the negligence of the defendant in the construction of a concrete bridge. The township appeals and seeks a reversal mainly on the ground that the verdict is contrary to the evidence and was given under influence of passion and prejudice. It is substantially an attempt to have this court pass upon the weight of the testimony.

The appellant's contentions are, *first*, that there was no negligence in the construction of the bridge, although the jury, upon what must be regarded as sufficient evidence, found that there was negligence; *second*, that if the bridge was negligently constructed, that was not the proximate cause of the injury; and *third*, that the township is not liable by reason of failure to give the trustee notice as required by the statute.

In August, 1913, the township constructed a concrete bridge across a small creek on a highway south of the town of Bufalo. The bridge is 12 feet 5 inches in the clear between the

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abutments, 16 feet in length, and on either side there is a concrete guard or railing 18 inches high and 8 inches thick. The original plan contemplated putting up a railing of 2-inch gas pipe on either side, and in each of the concrete guards three 2-inch holes were left for that purpose, one at each end and one in the middle. For some reason no railing was constructed upon the concrete guard. The accident happened in March, 1914. The plaintiff, together with Mrs. Perkins and another woman who held a small child on her lap, was riding in a single-seated buggy, Mrs. Perkins driving. When the horse reached the middle of the bridge it became frightened at an animal in the creek below and commenced to back. In some manner both rear wheels got astride one of the concrete guards and the buggy hung suspended, spilling the occupants into the creek bed and injuring the plaintiff. At the trial the defendant had a theory that the horse backed the buggy entirely off the bridge, then moved forward, drawing the rear wheels over the outside of the concrete guard. We are unable to see what particular difference it would make just how the accident happened, if the negligence in the construction of the bridge, which the jury found was the proximate cause of the accident, was in not having a sufficient guard-rail. It was stipulated at the trial that the height of the hub on the wheels of the vehicle in which plaintiff was riding was 21 inches.

There is nothing in the evidence or findings to indicate that the jury were influenced by passion or bias, or, as defendant contends, found a verdict for plaintiff because of sympathy for her. Much of defendant's argument would have been proper before the jury, but has no place here, because it requires us to pass upon the weight of the evidence. The trustee of the township was a witness, and while he disclosed a very deficient memory, there was enough in his admissions to show that he had actual notice of the condition of the bridge. The only conflict in the evidence was over the question whether the bridge was negligently constructed by reason of the height of the guard. The statute makes it the duty of the township trustee to "cause to be placed, in a substantial manner, and maintained in good repair, on each and every bridge of a span of ten feet and over erected by any township or road district upon any public highway in their respective townships, good and

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sufficient guard-rails on each side of any such bridge." (Gen. Stat. 1915, § 723.) Section 722 of the General Statutes of 1915 makes the township liable to any person injured on account of a defective bridge, who is free from fault or negligence, provided the trustee has had notice of such defective condition at least five days prior to the injury.

The county engineer and other witnesses familiar with the construction of bridges testified on behalf of the township, in substance, that in their opinion the guard was sufficient. The jury have found on conflicting evidence that it was not, and that the insufficient guard was the proximate cause of plaintiff's injuries. There was no conflict in the evidence showing notice to the trustee, and the jury have absolved the plaintiff from fault or negligence on her part.

The judgment is affirmed.

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No. 21,095.

W. M. FORBES, *Appellee*, v. JOHN C. MADDEN, *Appellant*, et al.

SYLLABUS BY THE COURT.

**INJUNCTION—Restraining Enforcement of Mandate of Supreme Court—Application Without Merit—Case Dismissed.** On a former appeal the judgment in this case was affirmed (*Forbes v. Madden*, 98 Kan. 559, 158 Pac. 850), and in due time the mandate was sent down and spread on the record. Thereafter defendant applied to the district court for an injunction to restrain the enforcement of the mandate and to have the district court pass upon the decision of this court and determine whether it was legally rendered. The district court held that it is without power to restrain and enjoin judgments and orders of the supreme court. The appeal from this ruling being without semblance of merit, it is dismissed at the costs of defendant.

Appeal from Shawnee district court, division No. 2; GEORGE H. WHITCOMB, judge. Opinion filed December 8, 1917. Dismissed.

*J. M. Stark*, of Topeka, for the appellant.

*J. B. Larimer*, of Topeka, for the appellee.

The opinion of the court was delivered by

PORTER, J.: Originally the action was one by plaintiff to recover from defendant upon certain promissory notes. The district court on December 21, 1914, rendered judgment against the defendant in plaintiff's favor. On appeal to this court the judgment was affirmed (*Forbes v. Madden*, 98 Kan. 559, 158 Pac. 850). In due course the mandate directing that the judgment be affirmed was sent down to the district court and spread on the record.

Thereafter the defendant filed an application in the district court asking for a restraining order and injunction to prevent the enforcement of the mandate and to restrain the plaintiff from proceeding against him and his sureties upon the supersedeas bond. He now comes to this court on appeal claiming that the district court erred in refusing to grant him the relief.

It is not contended, and cannot be, that the mandate is ambiguous. The defendant is still dissatisfied with the original judgment of the trial court and with the decision and opinion of this court affirming that judgment. This is the real grievance of which he complains. In his application for the injunction he asked to have the district court pass upon the decision of this court and determine whether it was legally rendered in substantial compliance with the code of procedure, and whether the opinion and mandate violated the rights of the defendant and deprived him of property without due process of law, and denied to him the equal protection of the laws as guaranteed by the constitution of the United States. A mere statement of the facts is sufficient to show that the proceeding cannot be maintained. It is not necessary in this proceeding to construe section 592 of the civil code, which makes it the duty of the justices of the supreme court to prepare and file with the papers in each case "full notes of the opinion of the court upon the questions of law arising in the case," or the provision of section 593 requiring a written syllabus of the points of law decided in each case. The defendant has had his day in court. The judgment of the district court was affirmed, and every point sought to be raised by him in this proceeding was necessarily included in and determined against him when his

petition for rehearing was denied. The mandate directed the district court to affirm the judgment, and there remained nothing for that court to do but to obey. When the petition for rehearing was denied the judgment became final and conclusive as to all questions sought to be raised by this proceeding. If defendant was not satisfied with the decision and opinion on the former appeal; if he believed that any of his constitutional rights were infringed, the only method of redress left for him, in case this court refused to reopen the cause, was by appeal to the supreme court of the United States. The district court is without power to restrain or enjoin judgments and orders of the supreme court. The appeal being without semblance of merit, it is dismissed at the costs of defendant.

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No. 21,101.

BURRTON ALLISON, *Appellee*, v. GEORGE HERN, as Chief of Police, GEORGE HERN, Jr., and H. E. COLBY, *Appellants*.

SYLLABUS BY THE COURT.

REPLEVIN—*Taxicab Used in Maintaining Liquor Nuisance—Policeman Entitled to Possession.* Under an ordinance requiring the search of a place charged to be kept for the maintenance of a nuisance and directing the seizure and destruction of all property used for such purpose, the driver of a taxicab was arrested on the charge of using such vehicle on the streets of the city of Hutchinson for the purpose of maintaining a nuisance by keeping intoxicating liquors therein for unlawful sale. The ordinance did not provide for notice and hearing before destroying such property, but the driver and the owner were nevertheless notified that a hearing would be had before the police judge to show cause why the taxicab should not be adjudged forfeited and ordered destroyed. *Held*, that pending such determination the vehicle was rightfully in the custody of the officers and not the subject of replevin by its owner.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed December 8, 1917. Reversed.

Walter F. Jones, of Hutchinson, for the appellants.

W. H. Lewis, of Hutchinson, for the appellee.

The opinion of the court was delivered by

WEST, J.: A city ordinance of Hutchinson, passed while it was a city of the second class, provides that all places where intoxicating liquors are manufactured, sold, bartered or given away in violation of any of the provisions of such ordinance are declared to be common nuisances, and upon the judgment of the court finding such place to be a nuisance under the ordinance the city marshal shall be directed to shut up and abate such place

"by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance; and such personal property so taken possession of shall be forthwith publicly destroyed by such officer."

Under this ordinance the driver of plaintiff's taxicab was arrested by the police on a complaint charging that—

"The public streets, avenues, alleys and ways in the city of Hutchinson, Reno county, Kansas, is a place where intoxicating liquors are sold, bartered or given away by the defendant Frank Grissom and is a place where people resort and are permitted to resort by said defendant for the purpose of drinking intoxicating liquor as a beverage and where intoxicating liquors are unlawfully kept by said Frank Grissom in a Ford taxicab for unlawful sale, gift, barter and delivery to the common nuisance. . . ."

Notice was served upon Grissom and the plaintiff that the taxicab had been seized as property used for the purpose of violating the prohibitory liquor law and the maintenance of a common nuisance, and they were notified to appear before the police judge and show cause, if any, why it should not be adjudged forfeited and ordered destroyed. The defendant appeared by his attorney and objected to a hearing, and the matter was adjourned, after which the plaintiff appeared before the police judge and requested the return of the taxicab, and then requested its return of the chief of police, and then brought this action in replevin, in pursuance of which the vehicle was delivered to the sheriff, no delivery bond being given. The taxicab was by the district court ordered returned and the police officers appeal.



This one question, they say, is presented:

"Can the appellee maintain an action in replevin for the recovery of personal property in the custody of the law held as personal property used in keeping and maintaining a liquor nuisance?"

They argue that the taxicab was held under a complaint pending a hearing upon the question of ordering it forfeited and destroyed; that the police had the right of possession pending such hearing; that it was not the province of the district court to determine whether or not it was subject to seizure under the ordinance or law; that it was personal property, and the only remedy the plaintiff had was to appear in police court, and if aggrieved by its decision appeal therefrom to the district court.

The trial court took the view that the place where a nuisance is maintained should be searched, but that under the ordinance the police had no right to seize the place itself, which in this instance was the taxicab, nor to destroy it; that as said in *The State v. Rabinowitz*, 85 Kan. 841, 118 Pac. 1040, they did not even have the right to padlock it. It was suggested that should a team and wagon or train of cars be engaged in maintaining a nuisance they could hardly be destroyed, because they would be the places in which the nuisances were maintained, and the police would have authority only to seize liquors, glasses, bars and pumps, etc., found in such places.

The plaintiff urges that the ordinance contains no provision for notice and hearing, and that therefore the retention of the vehicle cannot be justified. It is true that no such provision is found in the ordinance, but the city officials proceeded to give notice of hearing and treated the matter as if it were proper so to do.

The defendants cite *Karr v. Stahl*, 75 Kan. 387, 89 Pac. 669, wherein it was held that the owner of personal property which has been taken from him by a city marshal on a warrant issued in an action begun under an ordinance of the city cannot maintain replevin for its recovery, even though the ordinance be void.

It is well settled that a city has only such power to enact ordinances as may be granted by the legislature. Section 5532 of the General Statutes of 1915 empowers cities of all three classes to provide by ordinance for the suppression of

common nuisances, with a search of premises where they are maintained "and the seizure and destruction of all intoxicating liquors, bottles, glasses, kegs, pumps, bars and other property used in maintaining the same."

The ordinance in question provides that—

"Upon the judgment of the court finding such place to be a nuisance under this ordinance, the city marshal shall be directed to shut up and abate such place, by taking possession thereof, and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance; and such personal property so taken possession of shall be forthwith publicly destroyed by such officer."

It will be observed that the statute mentions all property used in maintaining a common nuisance. Section 5527 of the General Statutes of 1915 provides that upon filing a complaint charging that a place is kept as a common nuisance, a warrant shall issue and the officer shall take into his custody all intoxicating liquors, bars, or other property described in the complaint. Section 5528 provides for notice after seizure, and section 5529 provides that if the officer shall find that any of the liquors or property seized were at the time complaint was filed used in maintaining a common nuisance he shall order it destroyed.

In *The State v. Rabinowitz*, 85 Kan. 841, 118 Pac. 1040, it was held that selling and delivering intoxicating liquors on the streets of a city may constitute a common nuisance. *The State v. Dykes*, 83 Kan. 250, 111 Pac. 179, was cited, wherein it was held that a part of an alley occupied by a barrel from which beer was unlawfully sold was a place where the nuisance was maintained. It was also said in the *Rabinowitz* case, at page 853, that if the place of the nuisance is public the court must adopt means suitable to the place and situation, and there could of course be no lien obtained on the premises, nor could they be padlocked or closed, removed, or destroyed. This is necessarily true of streets and alleys, and yet a nuisance maintained thereon may nevertheless be abated. In *Breweries Co. v. Kansas City*, 96 Kan. 731, 153 Pac. 523, a vehicle moving from one place in a city to another for the sale of intoxicating liquors was held to be a "place."

The complaint in this case charged that the public streets, avenues and alleys of Hutchinson were a place

"where intoxicating liquors are unlawfully kept by said Frank Grissom in a Ford taxicab for unlawful sale, . . . and that . . . intoxicating liquors are kept in bottles, cases, kegs, barrels, tubs, boxes, ice-chests and a Ford taxicab or automobile and various and other places in and about said public streets, . . . and that said place is and has been so unlawfully kept and maintained . . . and that said Ford taxicab or automobile was and is used for the purpose of maintaining said public nuisance."

What this charge amounts to is that the taxicab was used for the conveyance of liquors over the streets of Hutchinson for unlawful sale. That is to say, that the driver was by the use of the taxicab making the streets of Hutchinson a "place" where a nuisance was maintained. There was no attempt to seize the streets, but there was a seizure of the taxicab, and the ordinance expressly provides that upon proof that it was used in the maintenance of a nuisance it should be destroyed.

Under the law and under the ordinance the officers had a right to seize it, they had a right to hold it, they had a right to ascertain judicially whether it had been so used, and if so, then they had resting upon them the duty to destroy it. Regardless of notice to the owner or to the driver pending such judicial ascertainment, the vehicle was in the custody of the officers and, therefore, in the custody of the law and not subject to replevin.

With this construction given the complaint there seems to be no difficulty about the conclusion to be reached. The fact that notice was given the owner can in no wise militate against the officers, or against their right to retain possession of the taxicab until it was determined whether it had been unlawfully used as charged.

The judgment is reversed and the cause remanded for further proceedings in accordance herewith.

No. 21,106.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *Appellant*, v.  
THOMAS A. BIGGER, *Appellee*.

## SYLLABUS BY THE COURT.

INSURANCE AGENT—*Failure to Cancel Policy as Instructed—Agent's Liability for Loss.* When instructed to do so, it is the duty of an insurance agent to cancel a policy of insurance issued by him; and if he fails to cancel the policy he is liable to his principal for the damage sustained by the principal unless the agent can show some valid reason for his failure to follow the instructions given him.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed December 8, 1917. Reversed.

*J. E. McFadden, O. Q. Claflin*, both of Kansas City, *M. A. Fike*, and *E. L. Snyder*, both of Kansas City, Mo., for the appellant.

*A. L. Berger*, of Kansas City, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff seeks to recover judgment against the defendant for damages caused by the defendant's failure to cancel a fire insurance policy. Judgment for costs was rendered in favor of the defendant, and the plaintiff appeals.

The plaintiff was an insurance company engaged in writing fire insurance. The defendant was the plaintiff's agent in Kansas City, Kan. James H. Garnsey, of Kansas City, Mo., applied to the defendant for an insurance policy to cover property owned by the Elm Ridge Golf and Country Club Association, and a policy, dated August 24, 1913, was issued by the defendant to the association in the sum of \$3,000. The policy contained the following provision:

"This policy shall be canceled at any time at the request of the insured, or by the Company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void and cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, or last renewal, this company retaining the customary short rate; except when this policy is

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canceled by this company by giving notice, it shall retain only the *pro rata* premium."

Immediately on receipt of the daily report, forwarded by the defendant, the plaintiff notified the defendant to take up and return the policy at once. On October 27, 1913, the property insured was destroyed by fire. The premium on the policy was paid to the defendant by Mr. Garnsey some time in September, 1913, and that premium was remitted to the plaintiff about December 20, 1913, after the property had been burned. On October 29, 1913, the defendant wrote to the plaintiff as follows:

"Enclosed please find loss notice under above policy, Elm Ridge Golf & Country Club Association.

"I received notice to cancel this policy and had same rewritten three times. I supposed your policy had been canceled and find Company in which this business had been placed canceled same and through some oversight this policy was still in force. Very sorry this has occurred, as I thought policy had been sent you long since and did not know any different until this notice was received."

The plaintiff paid \$2,531.35 to the Elm Ridge Golf and Country Club Association in full settlement of its liability under the policy. From the time the plaintiff wrote the defendant to take up and return the policy until it received the notice of loss it did not know that the policy had not been taken up or canceled. The defendant testified that when he received the letter notifying him to take up and return the policy he talked with James H. Garnsey concerning the matter and told him that the company desired to cancel the policy, and asked him to return it, and that Mr. Garnsey agreed to do so. That testimony was contradicted by Mr. Garnsey.

This action was brought by the plaintiff to recover the amount, with interest, that it had paid on the policy.

The plaintiff complains of the thirteenth instruction to the jury. The court, in part, instructed the jury as follows:

"9. If you find from the preponderance of the evidence that the defendant was instructed by the plaintiff to cancel and return the policy in question, then it was the duty of the defendant to exercise such care and diligence to procure said policy and cancel the same as a reasonably prudent person, engaged in the same business, would have exercised under the same circumstances; and if the defendant failed to exercise such care and diligence and thereby caused the plaintiff to suffer loss by reason of being compelled to pay said policy of insurance after the in-

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sured premises had burned, then it will be your duty to return a verdict in favor of the plaintiff for the amount of the loss so sustained by the plaintiff, together with interest thereon from the date of the payment of said policy to the date of your verdict, not to exceed the amount claimed by plaintiff in its petition; unless plaintiff by its own conduct is barred from recovery as hereinafter stated in instruction No. 13.

"13. If you find from the evidence that the plaintiff had the right to cancel said policy under the terms thereof and with full knowledge of all the facts and circumstances in connection with said policy, the insured premises, and the defendant's failure, if any, to take proper steps to have said policy canceled, elected to allow said policy to continue in force and failed to exercise its right to cancel said policy and thereby suffered a loss then no right to recover damages accrued to the plaintiff and your verdict will be for the defendant."

The 13th instruction was erroneous. There was no evidence on which it could properly be submitted. The plaintiff's direction to the defendant to cancel the policy was positive and unambiguous. It was the defendant's duty to obey his instructions. In *Insurance Co. v. Baer*, 94 Kan. 777, 147 Pac. 840, this court said:

"An insurance agent who issues a policy of insurance in violation of the instructions of his company is liable to the company for the amount of insurance paid and expenses incurred by the company on account of a loss under the policy." (Syl. ¶ 2.)

If an insurance agent is liable for issuing a policy in violation of his instructions, he must be liable for his failure to cancel one when instructed so to do.

"It is the duty of the principal's agent when ordered peremptorily to cancel a risk, to exercise reasonable diligence to execute the order, and his neglect to do so renders him liable to the company for a resulting loss." (2 Joyce on The Law of Insurance, 2d ed., § 666.)

(See, also, *Insurance Co. v. First National Bank*, 18 N. D. 603; *Franklin Ins. Co. v. Sears*, 21 Fed. 290; *Washington Fire & Marine Ins. Co. v. Chesebro*, 35 Fed. 477; Note, 22 L. R. A., n. s., 509; 2 C. J. 715.)

The defendant did not cancel the policy, and no excuse was shown by him for not doing so. The plaintiff did not elect to allow the policy to continue in force. It supposed that the policy had been canceled until the letter to the contrary was received from the defendant. The defendant's agency was then revoked. After the agency had been revoked, and after the plaintiff's liability on the policy had been fixed, the de-

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endant remitted the premium to the plaintiff. The acceptance and retention of the premium by the plaintiff at that time did not relieve the defendant from liability.

The judgment is reversed and a new trial is directed.

No. 21,107.

THE EMERSON-BRANTINGHAM IMPLEMENT COMPANY, *Appellant*, v. ARTHUR WILLHITE et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. *REPLEVIN—Pleadings—Demurrer.* Parts of an answer to a petition in an action in replevin examined, and no prejudice disclosed in overruling a demurrer thereto.
2. *SAME—Chattel-mortgage Sale—Right of Possession.* Where possession of personal property is demanded in an action in replevin, it is immaterial whether the right of possession is claimed by the mortgagee under his chattel mortgage or, under his purchase of the property at a sale pursuant to the conditions of the chattel mortgage.
3. *SALE—Threshing Machine—Note and Mortgage—Breach of Warranty—Rescission.* Where a machine is sold by a vendor subject to a guaranty that it will perform the work for which it was purchased by the vendee, and promissory notes are given in payment therefor, which notes are secured by a chattel mortgage on the machine and other property, a complete and total failure of the machine to perform the work for which it was purchased justifies a prompt return of the property and a rescission of the contract and effects an extinguishment of the chattel mortgage.
4. *SAME—Breach of Warranty—Rescission—Return of Property.* The facts relating to a return of a threshing machine which had proved altogether worthless for the purpose for which it was bought, examined, and held that there was a substantial compliance with the contract provisions as to the place to which it was to be returned.
5. *SALE—Written Contract—Fraud and Misrepresentation—Parol Evidence.* The question of the competency of parol evidence to show fraud and misrepresentation in procuring signatures to a short and simple written instrument, waiving guaranties of an earlier contract between the parties, examined but undecided, it being held unnecessary for the determination of the present appeal.
6. *SAME—Effect of New Contract of Conditional Sale.* The facts relating to an agreement to make a second test of a machine's usefulness, after a first test had demonstrated its unfitness, examined, and held that this agreement created a new contract of conditional sale but did not reanimate a chattel mortgage covering the machine, etc., which

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was extinguished by the total failure of consideration under the first contract.

7. **BILL OF SALE**—*Executed by Unauthorized Agent.* The execution of a bill of sale and other instruments by one unauthorized to sign them does not bind the party in whose name the instruments are signed.
8. **APPEAL**—*Findings of Fact Undisturbed.* Rule followed that a finding of fact as to the value of chattel property, based upon competent and substantial though conflicting evidence, cannot be disturbed on appeal.

Appeal from Ford district court; LITTLETON M. DAY, judge.  
Opinion filed December 8, 1917. Affirmed.

*Albert Watkins*, and *Arthur C. Scates*, both of Dodge City,  
for the appellant; *W. R. Baxter*, of Rockford, Ill., of counsel.

*Edgar Foster*, of Dodge City, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: This was an action in replevin to recover possession of a steam engine. The plaintiff's claim to possession was based upon a chattel mortgage on the engine executed by the defendants Arthur Willhite and his wife to secure the payment of the purchase price of a threshing machine bought by Willhite from Reeves & Co., the business predecessor and assignor of plaintiff. Plaintiff also claimed a right of possession based upon a purchase of the engine at a sale of it pursuant to that mortgage.

The defendants' answer pleaded, and their evidence tended to prove, that they had purchased a threshing machine from Reeves & Co., the assignor of plaintiff, in June, 1910, giving promissory notes in payment therefor, and that the chattel mortgage was given on their engine and other property to secure the payment of the notes. The threshing machine was purchased by Willhite under a written contract containing the vendor's warranty of its construction, and that it would do the work of a threshing separator in a suitable and proper manner. It utterly failed in these particulars, and the plaintiff was promptly notified thereof. The machine was returned to the town of Bucklin, where it had been delivered to defendants, and plaintiff was so advised. This was in accordance with the terms of the contract of sale.

On January 28, 1911, the plaintiff's agent and the defendants effected an agreement whereby defendants promised to



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give the separator another trial during the threshing season of 1911, the plaintiff in the meantime agreeing to furnish certain new parts and repairs for the machine, and to furnish a workman to help in overhauling it; and accordingly the defendants did give the machine another fair trial, but again it wholly failed to thresh grain in a proper manner, "of which facts defendants duly notified plaintiff, but plaintiff did nothing whatever to remedy the defects or to make said separator work properly."

At the time the plaintiff's agent induced defendants to give the machine another trial, and as an inducement thereto he offered them a credit of \$200 upon the original purchase price of the machine, and he produced a printed blank form of receipt, filled in the date and amount of credit, and it was signed by the parties:

"Bucklin, Kansas, Jan. 28, 1911.

In consideration of Two Hundred and no/100 . . . Dollars, to me in hand paid by Reeves & Co. (Incorporated), of Columbus, Ind., receipt whereof is hereby confessed, and for divers other good and valuable considerations, I do hereby forever release and discharge said company, its officers and agents, from any claim demand and cause of action whatsoever from any cause arising, prior to the date hereof, and do release said company from all warranty and responsibility, express or implied, growing out of any transactions heretofore had.

"Witness my hand and seal.

"ARTHUR WILLHITE, (Seal)

"ETHEL WILLHITE, (Seal)

"A. L. WILLHITE.

"In presence of E. E. Willhite.

"EMORY CROUSE, [Plaintiff's agent.]"

Defendants also pleaded, and their evidence tended to prove, that their signatures were procured to this document through the fraud and misrepresentation of plaintiff's agent, that he told them that it only contained provisions for defendants' giving the machine another trial under the same terms of guaranty as the original purchase, and that in reliance on the agent's statement of its contents, they signed it without reading it.

The trial court made findings of fact favorable to defendants and gave judgment in their behalf.

The errors specified by plaintiff will be noted.

No error can be discerned in the ruling of the trial court on the demurrer to part of defendants' answer.

Under the error assigned in the rendering of judgment for defendants several matters are presented.

The trial court held correctly that it was not very important whether the sale under the chattel mortgage was regular or not. If the mortgage was valid, plaintiff was entitled to possession of the engine, either as mortgagee or as purchaser under the mortgage sale. The case was tried and decided on the theory that the mortgage was void because the consideration wholly failed through the utter worthlessness of the threshing machine, and that the contract had been rescinded by defendants.

As to the original contract of purchase this theory was undoubtedly correct. The contract of sale and warranty were in evidence, the proof showed the total failure of the threshing machine to do the work in a proper manner, and the plaintiff was promptly notified and the machine was returned to the place (Bucklin) where defendants had received it. A mere breach of warranty is not necessarily a total failure of consideration, but an utter failure of the machine to do the work for which it was knowingly sold by the vendor was a total failure of consideration.

A minor point is raised that the machine was not returned to the exact place where it was unloaded from the railroad in Bucklin. It seems, however, that it was left at a suitable place in Bucklin suggested by plaintiff's agent. That was sufficient.

It is also urged that a failure of parts of the machine would not justify a rescission of the whole contract, that the contract provided against that result. It did so provide, but the evidence and the findings were that the entire machine was worthless. The trial court found:

"The evidence further shows, and it is undisputed, that the machine was practically worthless—absolutely worthless. When they took it out and tried to work with it, they threshed one stack, then they threshed it over again, the same straw, and got 88 bushels [should be read 15 bushels] or something like that, out of the same straw that they had threshed."

The net result up to this point, therefore, was a complete termination of affairs between the litigants, a fair trial of the machine, its total—not partial—failure to perform, a prompt

notification, a substantial compliance with the requirement to return, and a consequent total failure of consideration, and a consequent complete defense to the notes for payment and a complete extinguishment of the plaintiff's chattel-mortgage claim to the steam engine in controversy.

Turning then to the problems presented which arise out of defendants' agreement with plaintiff's agent to give the machine another trial in the threshing season of 1911: It is difficult to see how the written instrument which the plaintiff's agent so cleverly induced defendants to sign had any effect to reanimate the chattel mortgage which was already extinguished, even if this court were to adopt plaintiff's contention that the parol evidence of misrepresentation and fraud by plaintiff's agent, which deceived and induced the defendants to sign the instrument, was inadmissible. The written instrument, if *bona fide*, waived the guaranties of the original contract. But the whole original contract, including its guaranties and conditions, was already terminated. This view does lead to some inconsistency in the position of defendants, for they were apparently awed by the terms of the instrument renouncing the guaranties and contended that they were not bound thereby (on account of fraud), and that they might still rely on the guaranties. The court is inclined to hold that they were wrong in the latter contention, for if the guaranties could still be relied upon the whole of the original contract could and should govern also, and it cannot be said that there was a prompt return of the property to Bucklin after the second trial of the machine, such as was prescribed by the original contract. After the effort to make the machine work in 1911, and after its worthlessness was again determined, defendants left it by the roadside several miles from Bucklin.

But we do not find that the trial court exactly adopted the theory of either plaintiff or defendants touching the rights and liabilities of the parties. The finding reads:

"On the 28th of January, 1911—the machine was bought in 1910—the agent came to the Willhites in Bucklin, Kansas, and after considerable talk he agreed to fix the machine up and furnish a new grain pan and several other parts and told the Willhites that they would knock off two hundred dollars of the purchase price and give them credit on the note for two hundred dollars. That they could take the machine out

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again after the harvest, after the new crop came in, and try it with these repairs, and if it did n't work good, they were to take it back."

It is just a little obscure as to which party is meant by the pronoun "they" in the last line just quoted; but the context of the trial court's findings, which were very informal and apparently delivered orally from the bench, indicates that the word "they" refers to the plaintiff company. This view makes the finding harmonize with the judgment, and accords with the trial court's further finding and judgment overruling the motion for a new trial:

"On the question of the warranty, that machine did n't fulfill the warranty. The evidence showed that clearly. They brought it back and delivered it to the place where they got it. The agent came and recognized the fact that it did n't comply with the warranty, and says, here, take it back and try it again; I will furnish certain repairs, and if you do that, I will allow you \$200 on your note. He did n't pay them any \$200; he allowed them a credit of \$200. They testified that the agent told them that if it did n't perform right after the repairs were put on they did n't need to take it. That warranty was not continued. There was a new contract there."

In these findings it does not appear that there was any obligation to return the machine to Bucklin a second time. The second contract was for a very simple conditional sale. Defendants were to try the machine, and if it would not work there was to be no second sale.

Viewing the matter from still another angle, and again avoiding the very debatable question as to the competency of the oral evidence to avoid the force of the short and simple written instrument—for the court holds it is unnecessary to decide that point—if the warranty goes out of the case by reason of the written instrument, then it seems clear that there was in fact a new contract, an oral contract, between the parties, and that later oral contract did not provide for the return of the machine to Bucklin. And doubtless plaintiff's agent did not consider that the new contract contemplated any situation whatever where the defendants would have either a right or a duty to return the machine to Bucklin. Armed with the written instrument waiving the guaranties, his idea was that he had gotten rid of the machine for good and all, and pursuant to that theory he declined even to look the machine over or give any suggestions which might be helpful to make

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it work for fear it would revive the conditions of the earlier contract which had been eliminated, if not by the first rescission, then by the written instrument which he had induced the defendants to sign. This agent testified:

"A. The next day I was driving through the country and drove by the machine but I never touched the machine in any way.

"Q. What did you say to Emerson when he asked you to go out to see the machine? A. I told him positively I could not do it. That I was a bonded man and if I went out and worked on the machine it would practically reopen the warranty."

This evidence demonstrates that plaintiff did not consider that defendants had either a right or duty to return the machine to Bucklin under any circumstances.

Another point earnestly pressed by plaintiff relates to the use, sale and barter of the machine during the year 1911 by and between the defendants. There is no evidence of use of the machine after it had failed to work at the test given it in August, 1911, as per defendants' agreement with plaintiff's agent. A bill of sale for the separator and other property from the principal defendant, Arthur Willhite, to one of his relatives, "Same is free from all incumbrance except to Reeves & Co.," was introduced in evidence; and also contract for the use of the thresher, 40 per cent of the earnings to be applied on the indebtedness of Arthur Willhite to Reeves & Co., plaintiff's assignor. This was satisfactorily explained. The bill of sale was not signed by Arthur, but by one of his brothers, and without authority from Arthur, who then resided in Indiana. The brother testified that he signed the contract agreeing to give Reeves & Co. 40 per cent "to help clean this matter up amicably if possible." Moreover, the contracts of sale and for the use of the separator were never carried out.

Finally it is urged that the trial court erred in finding the value of the steam engine to be \$600.

Plaintiff's witness testified:

". . . the engine when replevined was worth \$400 or \$500."

The defendant, Arthur Willhite, testified:

". . . engine was worth about \$600 at time it was taken in this replevin suit."

Another witness, Emerson Willhite, testified that the engine was worth about \$600 when replevined—somewhere in the neighborhood of that.

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All the witnesses were shown to be familiar with the value of steam engines, and the trial court was fully warranted in determining the value of the engine to be \$600 on the testimony quoted.

All the other matters urged by plaintiff have been carefully reviewed, but nothing further can be discerned which would warrant discussion, and nothing approaching prejudicial error can be discerned in the record, and the judgment is therefore affirmed.

No. 21,108.

J. E. NORRIS, *Appellant*, v. G. W. MCKEE, *Appellee*.

## SYLLABUS BY THE COURT.

1. LEASE OF HOTEL—*One-year Period—Nonpayment of Rent—Termination of Lease—Notice*. Under the statute, to terminate a lease of property for a period of one year on account of the nonpayment of rent, a ten-days notice in writing to quit must be given to the tenant, and such a notice will not terminate the tenancy if the rent is paid before the expiration of the ten days.
2. SAME—*Covenant Not to Underlet—Oral Consent of Landlord—Waiver*. Where a hotel is leased with the condition that the premises shall not be underlet without the written consent of the landlord, and the tenant temporarily rents a room of the hotel to a printer in which to set up a small printing outfit, without obtaining such written consent, and before it is done the landlord informs the printer that he has no objection to the use of the room for that purpose, he thereby waives the right to terminate the lease because of the underletting of the room, if that be a ground of forfeiture.

Appeal from Sedgwick district court, division No. 2; THORNTON W. SARGENT, judge. Opinion filed December 8, 1917. Affirmed.

O. H. Bentley, and J. C. Bentley, both of Wichita, for the appellant.

Dempster O. Potts, of Wichita, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: The forfeiture of a lease of a hotel is involved in this appeal. The hotel was leased by plaintiff to defendant for one year, the rent payable monthly in advance, and in the lease was a stipulation that the defendant would

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"not use or occupy said premises in any business deemed extra hazardous on account of fire or otherwise, nor let or underlet the same, except with the consent of the said landlord in writing, under penalty of forfeiture and damages." During his tenancy the defendant temporarily let a room of the hotel to Day and Torrey who placed in it a small printing outfit. Written consent of the plaintiff for the letting of the room was not obtained from the plaintiff, but it appears that he consulted with Day and Torrey before they occupied the room, and he told them that while the defendant had not mentioned the matter to him he had no objections to their occupancy of the room. Sometime afterwards, and on June 19, 1915, a monthly payment of rent was overdue, and the plaintiff served a notice upon defendant to quit the premises within three days "for nonpayment of rent; for breach of lease and as I desire to terminate the tenancy, which was due on the 17th day of June, 1915," etc. The case was tried without a jury, and the court gave judgment for defendant.

There is no claim that the use of the room by the printers, Day and Torrey, was extrahazardous, or more hazardous than the occupancy of the rooms by other persons to whom rooms were assigned. The parties must have contemplated that the defendant would let rooms when he had an opportunity. It is a fact that guests frequently transact some business in the rooms of a hotel to which they have been assigned. If it be assumed that the temporary letting of the rooms to Day and Torrey was not strictly within the line of hotel business, it can hardly be regarded as within the restriction against subletting. That appears to be a restriction on the leasing of the premises—the hotel—rather than the temporary letting of a room in the hotel wherein an unusual use may be made of such room.

If it be granted that the letting of the room was within the restriction, a question still remains whether the letting should be regarded as a forfeiture of the lease. It appears that a rental of \$10 became due on June 17, 1915, which was not paid, and two days later the plaintiff served a three days' notice to quit the premises. The controlling statute provides that "if a tenant for a period of three months or longer neglect or refuse to pay the rent when due, ten days' notice in writing to quit

shall determine the lease, unless such rent be paid before the expiration of said ten days." (Gen. Stat. 1915, § 5962.) The tenancy being for more than three months (a year), a ten-days notice was necessary to terminate the lease, and such a notice even would not terminate the tenancy if the rent be paid before the expiration of the ten days. (*Douglass v. Parker*, 32 Kan. 593, 5 Pac. 178.) The three-days notice given was insufficient for the purpose. Besides, it appears that within the three-days period the defendant tendered plaintiff \$10, the full amount of the rent that was due.

In his notice plaintiff adds to the ground of nonpayment the words "for breach of lease." This clause may be regarded as incidental to and a part of the ground of nonpayment of rent, as the latter constitutes a breach of the lease. If plaintiff meant that the breach was something else than nonpayment of rent he should have stated what act or omission constituted the breach. The subletting of the room had occurred some time before, but, as has been observed, his notice does not specify that as a ground for forfeiture. It may be doubted whether even a definite statement in the notice of that ground would of itself have effected a forfeiture. The lease stipulated that the misuse of the premises or the underletting of them should be "under penalty of forfeiture and damages." As both forfeiture and damages are coupled in the penalty, and as damages can only be recovered in an appropriate action, it may well be doubted whether the subletting *ipso facto* terminated the lease.

However that may be, the plaintiff, as we have seen, practically consented to the use of the room by Day and Torrey and has waived the right to terminate the lease upon that ground. It would be an injustice to permit plaintiff to encourage Day and Torrey to occupy the room and then make it a ground of forfeiture. The law does not favor forfeitures, and their effect is limited by a strict construction.

The judgment of the district court is affirmed.



No. 21,110.

P. T. FOLEY, *Appellee*, v. T. B. HAM et al., *Appellants*.

## SYLLABUS BY THE COURT.

1. **CRIMINAL PROSECUTIONS—*In Control of County Attorney.*** While the county attorney is not required to take part in a preliminary examination in a felony case unless requested to do so by the magistrate, if he does appear he is entitled to have full charge of the prosecution, and the case should be dismissed if he so directs.
2. **SAME—*County Attorney May Dismiss Action.*** Where a justice of the peace sitting as an examining magistrate refuses to dismiss a criminal prosecution on the motion of the county attorney, the district court, by an order in the nature of a writ of prohibition, may compel such action.
3. **SAME—*Refusal of Justice to Dismiss Action—Writ of Prohibition.*** Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition.
4. **SAME—*Transcript—Recitals of Justice's Docket—Jurisdiction of District Court.*** A transcript of the docket of a justice of the peace, which recites that after a preliminary examination a defendant was required to give bail for his appearance in the district court to answer the charge against him, is sufficient (together with the recognizance given by the defendant) to confer jurisdiction on the district court, although it omits a recital that it was found that an offense had been committed and that there was probable cause to believe the defendant guilty.
5. **SAME—*Unwarranted Prosecutions—Injunction.*** Injunction against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened.

Appeal from Labette district court; ELMER C. CLARK, judge.  
Opinion filed December 8, 1917. Affirmed.

Archie D. Neale, of Chetopa, for the appellants.

E. L. Burton, and George F. Burton, both of Parsons, for the appellee.

The opinion of the court was delivered by

MASON, J.: P. T. Foley was arrested upon a charge of paying persons to work (and in some instances to vote) for the election of certain candidates for public office, such conduct

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constituting a felony under the corrupt practices act. (Gen. Stat. 1915, §§ 4342, 4343.) A preliminary examination was held before a justice of the peace, by whom he was required to give bond to answer the charge. In the district court the county attorney asked to be relieved from filing an information, for the reason, among others, that there was not sufficient evidence in his possession to warrant a prosecution. The court made an order granting the request and the case was dismissed. The complaining witness then applied to other justices of the peace to issue a warrant on a complaint charging the same offenses. Two of them refused to do so, but a third issued a warrant and held an examination, resulting in the discharge of the defendant for want of evidence. A similar complaint was then filed with another justice of the peace, Johnson Wade, who issued a warrant upon which Foley was again arrested. The county attorney filed a written motion asking, and undertaking to direct, that the case be dismissed. The justice of the peace overruled the motion. Foley then brought an action in the district court against the justice of the peace (Wade), the complaining witness, T. B. Ham, and his attorney, A. D. Neale, asking that further proceedings before the justice be forbidden. Issues were joined, evidence was taken, and judgment was rendered in accordance with the prayer of the petition. The defendants appeal.

1. So far as concerns the justice of the peace the case amounts to an application for a writ of prohibition (or for a judgment or order in the nature of such a writ) forbidding further proceedings in the criminal case on the ground that the county attorney had full right to control the matter, and his direction for a dismissal should have been given effect. The first inquiry is as to the extent of the power of the county attorney in that respect. It is said that the public prosecutor, except as restrained by statute, has absolute control of criminal prosecutions, and has authority in virtue of his office to enter a *nolle prosequi*—a virtual dismissal—regardless of the attitude of the court. (32 Cyc. 713; 2 Bishop's New Criminal Procedure, 2d ed., § 1388; *People, ex rel., v. District Court*, 23 Colo. 466.) The practice in that respect, however, is not uniform in the different jurisdictions. (Notes, 35 L. R. A. 701; 45 L. R. A., n. s., 1123.) Our statute recognizes the county

attorney's right under ordinary circumstances to refuse to prosecute, by providing that in extreme cases the court may compel him to file an information. (Gen. Stat. 1915, § 7981.) And his need to exercise discretion in determining whether prosecutions shall be brought is made the ground of exempting him from civil liability for wrongfully instituting them. (*Smith v. Parman*, 101 Kan. 115, 165 Pac. 663.) He is made the representative of the state in litigation "in the several courts" of his county to which it is a party. (Gen. Stat. 1915, § 2620.) He is required to take charge of a preliminary examination in a felony case only when requested to do so by the magistrate. (Gen. Stat. 1915, § 2624.) The statute contemplates that criminal prosecutions may be instituted not only without his participation, but without his knowledge, provision being made for the protection of the public against costs in such cases, except upon his statement that prior consultation with him was impracticable. (Gen. Stat. 1915, § 4753.) Under statutes quite similar to ours it has been held that a court may by mandamus compel a sheriff to serve a warrant in a felony case, notwithstanding the county attorney had instructed him not to do so. (*Beecher v. Anderson*, 45 Mich. 543.) This decision has been cited in support of the doctrine that the county attorney does not have absolute control of a criminal case. (32 Cyc. 714; 23 A. & E. Encycl. of L. 275.) It is based, however, upon the conclusion that in the statute making it his duty to "appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications, and motions, whether civil or criminal, in which the state or county may be a party or interested," the phrase "the courts of the county" is intended to refer only to courts of record. In a situation closely analogous to that presented in the Michigan case this court held that the direction of the county attorney was controlling. A warrant charging a felony was placed in the hands of the sheriff. The county attorney directed him to return it and he did so. More than two years later the defendant was arrested upon the same warrant and claimed the benefit of the statute of limitations. The question presented was whether the prosecution was to be regarded as pending between the return of the warrant

already referred to and its reissuance, and this was treated as depending upon the power of the county attorney to control it. This court held that the bar of the statute had fallen, saying:

"The county attorney is the representative of the state in criminal prosecutions, and, subject only to a limited direction by the court, controls such actions. . . . And when the sheriff, by the direction of the county attorney, returns a warrant which has been placed in his hands for service to the court that issued it, this ends the official connection of the sheriff with such warrant, renders the warrant *functus officio*, and effects an abandonment of the prosecution by the state." (*In re Broadhead*, 74 Kan. 401, 405, 86 Pac. 458.)

Notwithstanding that the county attorney is not required to attend a preliminary examination unless asked to do so, we hold that he may appear if he sees fit, and when he does his authority is as complete as though his presence had been requested. The proceeding, while somewhat informal, is an adversary one. It is accusatory or litigious rather than inquisitorial in character. It has something of the aspect of a voluntary investigation conducted by the magistrate, while exercising a function somewhat analogous to that of a grand jury, to determine whether or not there is ground for a prosecution. But under our practice it is quite different from that. It constitutes actual litigation between opposing parties. Testimony taken at such a hearing may be used at the trial in the district court, if the attendance of the witness cannot be had (*The State v. Chadwell*, 94 Kan. 302, 146 Pac. 420; 8 R. C. L. 213, 214), a course which could scarcely be justified if the proceedings were not essentially judicial—a trial between opposing parties presided over by a judge. The state is the plaintiff, and the state's attorney, rather than the complaining witness or any other unofficial person, is entitled to speak in its behalf, and decide upon the course to be pursued in its interest.

"Unquestionably, a private individual has no longer any right to prosecute another for crime,—no right to control any criminal prosecution when once instituted. A criminal prosecution is a state affair, and the control of it is in the public prosecutor. . . . The purpose of a public prosecution is to prevent the use of the criminal law to gratify private malice or accomplish personal gain. This purpose is fully subverted when the control of the case is with the county attorney." (*State v. Wilson*, 24 Kan. 189, 192.)

"The law makes it the duty of the county attorney to conduct criminal prosecutions on behalf of the state, and all steps in the trial are alike

under his supervision and control. (*The State v. Wells*, 54 Kan. 161, 165, 37 Pac. 1005.)

"No one but the county attorney, or the attorney-general on proper occasion, or persons deputized by them, may control prosecutions within a county." (*The State v. Snelling*, 71 Kan. 499, 506, 80 Pac. 966.)

It is true that this interpretation of the law places in the hands of the county attorney a very large power, which is susceptible of abuse. That, however, is a necessary attribute of most governmental powers. In the case of a public officer some protection is afforded by statutes making official misconduct a crime (Gen. Stat. 1915, § 3588), and a basis for ouster (Gen. Stat. 1915, § 7603). The other theory—that the control of a felony prosecution until it reaches the district court, so far as a plaintiff may exercise control, rests with the prosecuting witness, or with any one who is under no official responsibility—would imply that the county attorney might be seriously embarrassed in the attempted enforcement of the criminal law by the interference of individuals, actuated by mistaken judgment or perverse purpose. For instance, a private prosecutor, if in charge of a preliminary examination upon a charge of gambling, might call the keeper of the gaming house and permit him to give such testimony as under the statute (Gen. Stat. 1915, § 3652) would result in his own complete immunity. Clearly the selection of witnesses to be used in that manner should rest with the county attorney, and not with individuals or with the justice of the peace. The power effectively to control a prosecution involves the power to determine when and before what tribunal it shall be brought and maintained, and therefore, whether it should be discontinued. We conclude that the justice of the peace should have acted upon the direction of the county attorney and dismissed the case.

Two federal cases militate somewhat against this conclusion, but they are based upon statutes not entirely like those of Kansas. (*United States v. Schumann*, 2 Abbott [U. S.] 523; *The United States v. Scroggins*, 3 Woods [U. S. Cir. Ct.] 529.)

2. It is contended that even if the justice of the peace ought to have dismissed the case upon the direction of the county attorney, his refusal to do so was a mere error for which prohibition is not an available remedy. It is doubtless true that

upon the filing of the motion to dismiss the justice did not lose jurisdiction in such sense as to render absolutely void everything that he thereafter did in the case. Prohibition is frequently spoken of as properly invoked only where it is sought to restrain a judicial officer from an act wholly beyond his jurisdiction. But expressions indicating some modification of this are not uncommon. Thus it is said that "the writ will lie in all cases either of abuse or usurpation of jurisdiction by an inferior tribunal" (32 Cyc. 604); and that

"Three conditions are necessary to warrant the granting of the relief: first, that the court, officer or person against whom it is sought is about to exercise judicial or quasi-judicial power; second, that the exercise of such power is unauthorized by law; third, that it will result in injury for which no other adequate remedy exists." (High's Extraordinary Legal Remedies, 3d ed., § 764a.)

In practice the writ is often used to prevent an act which in a strict technical sense is within the jurisdiction of the officer, but contrary to law—one which he has the power to perform, but not the legal right. Thus in a recent textbook it is said:

"The doctrine is universally held that a judge who has an interest in the subject matter of the litigation, is disqualified from hearing and adjudging the case, and where he attempts to do so, prohibition will be granted to restrain him." (2 Bailey on Habeas Corpus, § 360.)

(See, also, *State, ex rel. Jones, v. Gay*, 65 Wash. 629.)

Yet the disqualified judge is not wholly without jurisdiction, and if he acts the resulting judgment is not void, nor open to collateral attack. (*Jones v. Insurance Co.*, 85 Kan. 235, 116 Pac. 484.) Merely by way of illustration, it may be mentioned that the writ has been successfully invoked to correct an order requiring the production of records at an unreasonable place (*Equitable Life Assur. Society v. Hardin*, 166 Ky. 51); to stay proceedings before a judge who had declared his intention to rule in a particular way (*Cullins v. Williams*, 156 Ky. 57); to enforce the rule of *res judicata* (*State, ex rel. Burr et al., v. Whitney et al.*, 66 Fla. 24; *State, ex rel., v. Williams*, 221 Mo. 227); to restrain the hearing of a will contest because it was brought too late (*State, ex rel. Wood, v. Superior Court*, 76 Wash. 27; *McVey v. Butcher*, 72 W. Va. 526); to prevent the taking of evidence on matters not pertinent to the issue (*Müller v. Superior Court*, 25 Cal. App. 607); to prevent the splitting of a cause of action (*Bullard v. Thorpe et als.*, 66 Vt. 599); and

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even to prevent separate actions upon several notes of the defendant (*James v. Stokes, and als., &c.*, 77 Va. 225).

The district court, besides having general original jurisdiction of all matters not otherwise provided for, and jurisdiction in cases of appeal and error from all inferior courts and tribunals, is specifically given by the statute "a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses." (Gen. Stat. 1915, § 2957.) The clause quoted can hardly be regarded as referring only to appellate jurisdiction, because that had already been provided for, and because the phrase "to prevent . . . errors and abuses" points to a preventive and not a corrective remedy. If it was the duty of the justice of the peace to dismiss the criminal case upon the motion of the county attorney (and we have determined that it was), he acted beyond his legal authority in going ahead with the hearing, and we think prohibition was an appropriate method by which to require him to conform to the direction which we have decided the public prosecutor had a right to give.

It is true the plaintiff in this case might have submitted to the preliminary examination and given bond, if required to do so, for his appearance in the district court, and awaited his discharge upon the refusal of the county attorney to file an information, but that remedy manifestly might have been far from adequate.

3. A suggestion is made that the plaintiff had no right to resort to prohibition because he had not first invoked relief at the hands of the justice of the peace. When the justice had refused to dismiss the prosecution at the instance of the county attorney, a similar request by the accused would obviously have been a mere formality, the futility of which is demonstrated by the defense made in the district court on the ground that the county attorney did not have control of the case. (*State, ex rel., v. Bright*, 224 Mo. 514.)

4. In the first proceeding against Foley the docket of the justice did not recite findings that an offense had been committed and that there was probable cause to believe him guilty, facts that the statute requires to be shown in order to warrant binding him over. This is referred to by the defendants in this action as casting a doubt upon the jurisdiction of the dis-

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strict court in that case. The transcript showed that Foley was required to give bond for his appearance in the district court for trial, and this, with the giving of the bond, was sufficient for jurisdictional purposes. (*The State v. Tennison*, 39 Kan. 726, 18 Pac. 948.)

5. The decision that the order against the justice of the peace was properly granted renders of little practical consequence the question whether error was committed in rendering judgment against the individual defendants. As to them the action was one of injunction, and was maintainable for the same reasons that justified the prohibition against the officer, unless by reason of the rule which has sometimes been announced, that injunction against the prosecution of a criminal action will not lie except for the protection of property rights. (22 Cyc. 904; 14 R. C. L. 428.) This rule seems to be founded on these considerations: The accused has usually a fairly adequate remedy by making his defense in the criminal action; a court of equity has no jurisdiction of criminal matters, that subject being committed to courts of law; as a matter of public policy the courts ought not to interfere with the representatives of the public seeking the enforcement of the law. In the case of numerous, repeated and vexatious prosecutions it is evident that the remedy of meeting the charges in the courts where they are brought may not be entirely adequate; where the same court has jurisdiction of legal and equitable matters, distinctions founded on that difference are of little importance; and with respect to an injunction which runs not against the public prosecutor, but against individuals who seek to direct the machinery of the criminal law in opposition to his judgment, the objection based on a reluctance to embarrass officers in discharging their duty to the government does not apply. A court of equity would seem to be as responsive to a call for the protection of personal rights, in an appropriate case, as to one for the protection of rights relating to property. In *Brown v. City of Abilene*, 93 Kan. 737, it was said:

"The remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance." (Syl. ¶ 3.)

The case on its merits was decided upon oral evidence, and any debatable inferences of fact must be resolved in favor of



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the plaintiff. So far as the decision turns upon the exercise of discretion, the action of the district court must control. We conclude that no error is shown in any part of the court's order.

The judgment is affirmed.

No. 21,117.

M. C. WILLIAMS, *Appellee*, v. THE HOME INSURANCE COMPANY,  
*Appellant*.

## SYLLABUS BY THE COURT.

1. HAIL INSURANCE—*Oral Contract of Agent—Premium Retained by Company—Contract Valid—Estoppel*. In an action on an alleged oral contract for insurance, it is held, on the facts stated in the opinion, that the insurance company by retaining control and exercising ownership over the premium paid to its local agent is estopped to deny that it contracted to insure plaintiff's wheat crop against loss by hail, notwithstanding its local agent had no authority to make an oral contract for insurance.
2. SAME—*Amount of Loss—Incompetent Evidence Admitted*. Evidence of the amounts paid by the defendant to other persons in settlement of losses to wheat crops occasioned by the same storm is held, in the circumstances stated in the opinion, incompetent; and because of the failure of plaintiff to establish by competent evidence the amount of his loss, the judgment is reversed and the cause remanded for trial of that issue.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed December 8, 1917. Affirmed in part and reversed in part.

*E. C. Wilcox, Myrtle Youngberg*, both of Anthony, and *C. H. Mauntel*, of Alva, Okla., for the appellant.

*Vernon L. Day*, and *Donald Muir*, both of Anthony, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The action was one upon an oral contract for hail insurance. The plaintiff recovered and the defendant appeals.

In April, 1915, M. C. Williams, a farmer living in Harper county, desired insurance on his wheat crop and went to J. C.

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Elvin, local agent at Harper for the Home Insurance Company. He had insured his wheat with the same agent the previous season. Elvin prepared an application for insurance upon the regular form prescribed by the company, setting out a description of the land, the amount of wheat to be insured, the amount of the premium and with a provision that it should not be binding upon the company until approved by the agent at Oklahoma City. Williams signed the application and gave Elvin his personal note in full payment of the premium, which amounted to \$117.48. Elvin thereupon deposited in a bank in Anthony the amount of the note less his commission as local agent, taking the bank's certificate of deposit for \$85.44, payable to the Home Insurance Company, which he placed in an envelope with the application and mailed to the office of the company at Oklahoma City. The evidence is that at this time the defendant's manager at Oklahoma City was sick in a hospital. For some reason no written policy was issued by the company on the application. However, sometime during the month of May the defendant company learned that the certificate of deposit had been issued, and on May 22 wrote the bank as follows:

"On May 21st you wrote Mr J. C. Elvin of Harper, Kansas, stating that you had issued on April 26th your certificate of deposit No. 1403, payable to the Home Insurance Company for \$85.44. Beg to advise that we have never received the same, and wish to notify you not to pay the same if presented.

"In talking with our banker here he tells us that it is the custom where an indemnity bond is issued to a bank they will issue a duplicate certificate of deposit. If you will kindly fill out an indemnity bond on your form and send same to us we will have same executed and approved, at which time you can issue us a duplicate certificate of deposit."

The cashier of the bank was absent on a vacation when this letter came and it was never answered. Sometime in June a hailstorm partially destroyed plaintiff's wheat. An adjuster of the defendant went to Harper and adjusted losses sustained by eight or ten other farmers, occasioned by the same storm. He testified that through Mr. Elvin he learned of plaintiff's loss, and made an adjustment with plaintiff, subject to the approval of the company. By this adjustment plaintiff's loss was fixed at \$294, but the company never approved the adjustment.

The answer of the defendant was a general denial, and a special denial that Elvin was authorized to make an oral contract of insurance.

There is a complaint that the court received incompetent evidence and ruled out competent evidence. The plaintiff was permitted to testify to conversations with the local agent at the time the application was signed, in which the agent stated his intention to deposit the premium in the bank to the credit of the insurance company. This could not have prejudiced anyone, because it cannot be disputed that the money was deposited to the credit of the insurance company, and the company notified by letter of that fact. Besides, long before the loss occurred, the company received notice of the fact that the money had been deposited to its credit, and assumed to exercise control and ownership over the fund. By reason of this fact we think the defendant company is liable to the plaintiff, conceding that it had never authorized its agent to enter into an oral contract of insurance. It is estopped now to claim that he had no such authority, because with full notice of the fact that the money had been deposited in the bank to its credit as a premium for the insurance, it notified the bank not to pay the money out to anyone else, and elected to consider the premium as belonging to it. The money is still held by the bank; neither plaintiff nor anyone else, so far as the evidence shows, has ever interfered with defendant's right to collect it. When the defendant company wrote the bank claiming ownership of the deposit, it knew that no policy had been issued to plaintiff or to anyone else for which that deposit represented the premium; yet it was willing to accept and endeavored to secure possession of the premium at a time when no loss had been sustained. If plaintiff's wheat had been harvested without loss from storms, the defendant would have profited by the premium, and its own neglect to approve the application and issue a written policy ought not to relieve it from liability to the assured. It would be unconscionable to permit defendant to hold the premium in the bank subject to its control, and in the event plaintiff's wheat escaped loss, collect the premium, and refuse to collect it in order to relieve itself from liability, in the event loss occurred.

Before notifying the bank to hold the premium subject to its order the defendant company could have required, if it deemed

that essential, another written application from plaintiff, or it could have issued a written policy without such an application upon information easily obtained from its local agent. By exercising control and ownership over the premium it placed itself in a position to retain the benefits of a contract of insurance, and must assume the burdens of such a contract.

Because of this view of the case we deem it unnecessary to consider the complaints of error respecting evidence admitted to show agency of Elvin or of the adjuster. We do not think the jury were misled by failure of the court to define what was meant by affirmative claims, nor could there have been any prejudicial error in the instructions respecting agency. It may be conceded that the local agent had no authority to make an oral contract of insurance; if it be further conceded that the evidence offered to establish this was not sufficient, and that the instructions given in respect to this issue were erroneous, still the agent had authority to take applications for and receive premiums in payment of policies which were to be issued when the company approved the written application. The plaintiff never applied for an oral contract, and neither he nor the agent had such a contract in mind. The plaintiff made the written application on the usual blanks, and while the application was not available for evidence, the general terms of the application were sufficiently shown by the plaintiff's testimony and that of the agent. The application was received by the company because it was sent by mail, postage paid, and properly addressed to the home office. The defendant, without approving the application by issuing a policy, never disapproved it, and retained the premium until after the loss occurred. It makes little difference whether we call this an oral contract of insurance or what it is termed. It became a contract of insurance when defendant elected to accept and retain the premium, although the terms of the contract had to be established by oral evidence.

Notwithstanding what has been said, another trial will be necessary because of the failure of plaintiff to prove the amount of his loss. He produced a number of witnesses who lived in the same county and who had sustained loss by the same storm. Over the defendant's objection they were permitted to testify what per cent of loss they were paid by de-

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fendant. None of them had ever seen plaintiff's wheat after it was injured, and, of course, the evidence was not competent for the purpose for which it was offered. The defendant never accepted or approved the adjustment made by its agent, and the plaintiff could not rely upon that as fixing the amount of his loss. The parties may be able to agree upon the loss sustained by the plaintiff; if not, a new trial will be ordered to determine that question. Judgment reversed and cause remanded.

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No. 21,119.

BEN A. WOOD et al., *Appellants*, v. SYRACUSE SCHOOL DISTRICT NO. 1 IN HAMILTON COUNTY et al., *Appellees*.

SYLLABUS BY THE COURT.

SCHOOL DISTRICT—*Condemnation Proceedings—Award of Damages—Appeal by Landowners—Appeal Bond.* A number of landowners appealed from an award of damages on a condemnation matter, all joining in one bond, which recited the appointment of the appraisers, their report, and the desire to appeal, and closed with these words:

"That we hereby bind ourselves to pay all costs and expense of said appeal, should we be adjudged to pay them."

Following a motion to dismiss for want of sufficient bonds, the appealing parties requested leave to file proper bonds, which request was refused. *Held*, that such refusal was error.

Appeal from Hamilton district court; GEORGE J. DOWNER, judge. Opinion filed December 8, 1917. Reversed.

*H. P. Jones*, of Syracuse, and *Edgar Foster*, of Dodge City, for the appellants.

*George Getty*, of Syracuse, for the appellees.

The opinion of the court was delivered by

WEST, J.: From a condemnation of land for school purposes the plaintiffs, who own separate tracts, joined in an appeal bond signed by themselves only. This obligation recited the appointment of the appraisers, their report, and the desire of the defendants to appeal, and closed with these words:

"That we hereby bind ourselves to pay all costs and expense of said appeal, should we be adjudged to pay them."

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This bond was approved by the clerk of the district court. A motion to dismiss the appeal contained eleven different grounds, but amounted in substance to the suggestion that the bond was insufficient in form and should have been separate for each owner. The motion was sustained and the obligors appeal.

The statute (Gen. Stat. 1915, § 7824) requires the appealing party to enter into an undertaking to the adverse party, with at least one good and sufficient surety, in a sum not less than \$50 in any case, nor less than double the amount of judgment and costs, one of the conditions being that if judgment be rendered against him he will satisfy such judgment and costs. Such bond need not be signed by the party appealing.

The defendants, after calling attention to the joinder of the parties, rely very largely on *St. L. K. & S. W. Rly. Co. v. Morse*, 50 Kan. 99, 31 Pac. 676. It was there held that an appeal bond signed by the surety only and by no one else, which did not bind or obligate the surety in any amount whatever, was void and gave the appellate court no jurisdiction. It was said that the surety bound himself in no amount and did not agree to do anything whatever, which cannot be said of the bond now under consideration.

Of course, each landowner should have appealed separately and filed a separate bond, which should have followed the statutory requirements; but all the owners joined in the one given, and thus became sureties for one another and bound themselves therein to pay all costs and expense of the appeal should they be adjudged so to do.

This gave the court sufficient jurisdiction to permit an amendment. (*McClelland Bros. v. Allison*, 34 Kan. 155, 8 Pac. 239; *St. L. & S. F. Rly. Co. v. Hurst*, 52 Kan. 609, 35 Pac. 211; *Parker v. Gibson*, 78 Kan. 90, 96 Pac. 35; *Mercantile Co. v. Wimer*, 97 Kan. 31, 154 Pac. 216.)

The order of dismissal is reversed, and the cause remanded with directions to permit the filing of proper bonds.

No. 21,124.

ERWIN STEVENSON, *Appellee*, v. ARTHUR STEVENSON et al.,  
*Appellants*.

## SYLLABUS BY THE COURT.

1. *WILL — Construction — Life Estate—Estates in Remainder—Vested Title.* Where a testator bequeaths a life estate in his property to his widow and the remainder undivided to his sons, share and share alike, the sons acquire a vested remainder in the property, and they may sell and dispose of their undivided interests, subject to the rights of the widow under her life estate.
2. *SAME.* After a testator has disposed of his property by will—creating and bequeathing a life estate therein to his widow and bequeathing the remainder to his sons in undivided equal shares, a subsequent provision in the will, that if any son should die before the termination of the life estate such son's share should be paid to his descendants and should not lapse, is a mere direction in accordance with the statute of descents and distributions, and does not fairly imply that the sons may not absolutely dispose of the undivided interests vested in them by their father's will.
3. *SAME.* Where a life tenancy and remainders are carved out of an estate by will, and the remaindermen are *in esse*, definitely ascertained, and nothing but their death before the termination of the life tenancy can defeat their title, the remainders thus created and bestowed by the will are vested absolutely in the remaindermen.

Appeal from Smith district court; RICHARD M. PICKLER, judge. Opinion filed December 8, 1917. Affirmed.

*E. S. Rice*, and *W. S. Rice*, both of Smith Center, for the appellants.

*A. W. Relihan*, and *Ted D. Relihan*, both of Smith Center, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was a suit to quiet title, and it involves the construction of the will of the late Enoch Stevenson of Smith county. The will in part reads:

"Second: I give and bequeath to my beloved wife Harriet Stevenson all my property, real and personal, after paying my debts as provided in section first, for her sole use and benefit during the period of her

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natural life, and at her death the property real and personal shall be equally divided between my three sons as follows to wit:

"To my son Albert one-third (1-3)

"To my son Arthur one-third (1-3) and

"To my son Irwin one-third (1-3), share and share alike.

"Third: In case any of my children aforesaid should die in their mother's lifetime or in my lifetime leaving issue or descendants, I direct that his share shall not lapse, but shall be paid to such descendants in equal proportions."

The plaintiff, Erwin Stevenson, is one of three sons of Enoch Stevenson. The defendant, Arthur Stevenson, is plaintiff's brother; the other defendants are the widow and children of his deceased brother, Albert.

Enoch Stevenson died in 1890. In 1893 Albert quitclaimed his undivided one-third interest in the property to the plaintiff, Erwin (Irwin), for \$500, taking back a note and mortgage on the interest thus quitclaimed to secure the payment of part of that sum. The note was to mature in sixty days after the death of Harriet. About the same time, and in substantially the same way, Erwin acquired by quitclaim deed the undivided one-third interest of his brother Arthur.

Albert died in 1897. The mother, Harriet, died in 1915. Thereafter the plaintiff Erwin brought this suit to quiet title to the land described in the will, basing his title upon his one-third interest under his father's will, and upon the quitclaim deeds made to him by Albert and Arthur during their mother's life.

The pleadings of the parties set forth the pertinent facts without dispute. Demurrers were filed to defendants' answers, and judgment was entered for plaintiff.

What became of the estate of Enoch Stevenson at his death, under the terms of the will? The trial court held, in effect, that at Enoch's death a life estate in the property passed to Harriet, and that the remainder vested at once in Albert, Arthur, and Erwin; that while possession and enjoyment were deferred until their mother's death, the remainder of the fee became theirs absolutely. It cannot be discerned from the entire instrument that the testator intended to restrain his sons from parting with their several undivided interests until after their mother's death. At their father's death their interests became vested—not contingent. It is the law, and it



always has been the law in this state, and in this country, and in England—notwithstanding an occasional vagrant decision to the contrary—that when nothing but the death of a remainderman can defeat the maturity and perfection of his title, the title in remainder is vested absolutely in him. (*Bunting v. Speek*, 41 Kan. 424, 21 Pac. 288, and citations therein.) There is a loose expression sometimes used in discussing the law of contingent remainders, that such remainders are vested subject to their being divested, but to apply that expression to an ordinary vested remainder would create a new, illogical and inexact expression tending to befog an important phase of the law which has long been settled and well understood. If Albert, Arthur and Erwin had purchased their mother's life interest, can it be doubted that they would then have owned the entire fee? Or subject to their mother's life interest, could not the three sons jointly have conveyed their remainders to a stranger? And if such stranger had thereafter purchased the mother's life estate, would he not have a perfect title to the property? If Albert had acquired his mother's life estate and the remainder interests of his brothers, Arthur and Erwin, could he not then have conveyed the entire estate to a stranger and warranted it against his own heirs—his children; or could they in such case be heard to say that although all the estate had vested in their father, yet his own undivided one-third interest was vested subject to the possibility of its being divested by his own death in his mother's lifetime, and that such one-third interest automatically became theirs, or reverted to them by their father's death, notwithstanding he had conveyed to a stranger? These questions answer themselves. When title to property is once vested in definitely ascertained remaindermen, nothing can disturb it but alienation.

But it is useless to waste words on a feature of the law which has been thoroughly settled long ago.

In *Bunting v. Speek*, 41 Kan. 424, 21 Pac. 288, the will read:

"Second, I will and bequeath to my beloved wife, Nancy Bunting, after all my just debts and liabilities are paid, all the rest of my estate, real and personal, to have and to hold them, together with all rights and privileges thereto belonging, during her lifetime, and then they are to descend to my legal heirs." (p. 426.)

In that case the court traced the law from its early English sources down through the American cases, and as it had been defined by the recognized standard commentators, and held that at Bunting's death his heirs took a vested remainder in his property which could be lawfully conveyed away during the life of the life tenant. When the decision in *Bunting v. Speck* was rendered, thirty years ago, the question was open in this state and the court was free to follow the general principles of the common law, as it did do (pp. 427, 432), or to adopt another view if the common law governing the subject were inconsistent with the public policy of this state. The rule announced in *Bunting v. Speck* has been recognized in the following cases: *McLaughlin v. Penney*, 65 Kan. 523, 70 Pac. 341; *Strom v. Wood*, 100 Kan. 556, 164 Pac. 1100.

The same principle was adhered to in *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87, although in that case *Bunting v. Speck* was not cited. *Williams v. Bricker*, 83 Kan. 53, 109 Pac. 998, and *Bullock v. Wiltberger*, 92 Kan. 900, 142 Pac. 950, both involved a construction of the will of Louis Wiltberger, and it was held that the will clearly disclosed that the interests bequeathed to the testator's children were contingent upon their surviving their mother, and that if any of them did not so survive, the portion thus contingently bestowed should be bestowed upon the heirs of any such deceased child of the testator.

No such purpose is fairly disclosed in the will of Enoch Stevenson. The second clause of Stevenson's will disposes of the entire estate—a life estate to the widow and remainder in fee absolutely to the sons. The third clause of the will then undertakes to dispose of the *share* of any son who might die before the mother died. No man can dispose of another man's *share* by a will. Note the use of the word "lapse" in the third clause. Unless each son took a vested interest, there would be nothing to "lapse." Clearly the testator's direction in the third clause of the will merely indicates that he was not sure that the law would cast the interest bestowed on each son by the second clause of the will upon the heirs of any such son who might die before the termination of the life estate. As the matter stands, the third clause merely states what the law would direct if the third clause had been omitted.

It should be obvious also that even although a will might specifically provide that the testator's estate should be kept intact for a time, for example, for the duration of a life tenancy, no rule of public policy would be violated by the remaindermen by selling or disposing of their *undivided* remainder interests. The sale or barter of *undivided* interests would not affect the integrity of the estate nor frustrate any purpose of the testator.

The judgment is affirmed.

BURCH, J. (Concurring specially) :

The decision must turn on the interpretation given the will. What was the intention of the testator?

The entire estate was given to Harriet for her life, and at her death to the three sons in equal shares. The testator then dealt with certain situations which might arise, including the very one which occasioned this litigation: What if one of the sons, whose enjoyment of his share of the estate was deferred until his mother's death, should die first, leaving issue or descendants? The testator had a notion that under these circumstances the share would lapse. This was something which he did not wish to occur, so he inserted this provision in the will: "I direct that his share shall not lapse." Completing the precaution, the testator added this provision, "but shall be paid to such descendants in equal proportions."

The thing which obtruded upon the testator's attention in case a son should die before the life tenant, leaving descendants, and the thing which he took particular care to provide should not occur, was "lapse." What is it? The legal, the popular and the dictionary meanings are all the same. To lapse is to fail, to become ineffectual or void, to fail to pass from one proprietor to another, and specifically in case of a devise, to fail to take effect because of the death of the devisee. Therefore the provision of the will, "I direct that his share shall not lapse," means this: "In case a son shall die, leaving descendants, before his mother's life estate terminates, I direct that the share which I have given him shall not fail, or become ineffectual or void, or fail to take effect, because of his death." This is the very opposite of a devise of property to pass upon the happening of an uncertain and dubious event—surviving a life tenant,

and the very opposite of vesting an estate to be divested upon the happening of a contingency—death before a life tenant. On the other hand, the purpose clearly indicated was to vest in a son dying before his mother, his share of the estate as effectually as if death did not intervene.

There is no ambiguity in the will thus far. There remains to be considered the concluding provision of the third clause, "but shall be paid to such descendants in equal proportion." This provision, instead of overthrowing, confirms and carries out the one preceding it, whereby the creation of vested remainders was fortified. Use of the word "paid" indicates that technical and legal precision of language was not always attained. The testator used the word "issue," which is a term of very general signification, and in wills frequently means "heirs." To help phrase his thought, the testator attached to the general term the alternative, "or descendants," and then used the expression, "such descendants," to indicate whoever had been referred to. The primary and dominant thought, clearly and forcibly expressed, having been to prevent a devise from failing on account of the death of the devisee, the supplemental provision is more consistent with the idea of *descent* of a vested share of the estate than with the idea of a *devise over to descendants* of a lapsed share. If the meaning were less clear than it appears to me to be, the rule that a testator must leave no doubt of his intention to create a contingent instead of a vested remainder, might be invoked.

MASON, J. (dissenting in part): I concur in the conclusion that the deed executed by Arthur Stevenson conveyed all his interest in the property it described, and that upon his mother's death in his lifetime the title became perfect in the grantee. I also agree that the deed from Albert Stevenson passed a complete title, provided the interpretation placed upon the will by the majority of the court accords with the actual expressed intention of the testator. And this depends upon what he had in mind when, after having arranged that his wife should hold the property for her life, and that it should then go to his three sons, he added: "In case any of my children aforesaid should die in their mother's lifetime or in my lifetime leaving issue or descendants, I direct that his share shall

not lapse but shall be paid to such descendants in equal proportions." And this in turn depends upon whether he used the words "issue" and "descendants" with accuracy, or in a loose way as synonyms for "heirs." The context makes it unlikely that when he wrote "issue or descendants" he meant "heirs." The language "in case any of my children aforesaid should die in their mother's lifetime or in my lifetime leaving issue or descendants" implies that the testator had in mind that a son might die without leaving "issue or descendants"; he could hardly have been contemplating the possibility of the death of a son without any heirs at all. The contingency he was presumably thinking of was the death of a son leaving heirs of a particular class. The phrase "issue or descendants" does not appear to be one that either a lawyer or layman would be likely to use to designate a class which included the spouse of a decedent. It seems to me that in selecting these rather unusual words the testator indicated a purpose that the property which was to go to one of his sons if he survived his mother, should otherwise pass to the son's children (if any) to the exclusion of his wife, if he left one. This was a disposition which the testator had a right to make. If he used the words "issue" and "descendants" in what appears to me to be their natural and ordinary (as well as their literal and technical) meaning, each son upon the death of his father acquired a vested interest in the property, subject to be divested by his death, leaving issue, in his mother's lifetime. Each could convey away all that he had, but no more. He had no power to defeat the provision made by the will for the benefit of his children. Therefore, the deed made by Albert Stevenson did not prevent his children taking title, upon the death of his mother, to the property which he would have received if he had survived her, their title being derived from the will and not from the law of descents and distributions, which would have required them to share it with their mother, if living. I presume there is no controversy about this, if the will indicates that the testator intended that in case Albert died before his mother the property he would otherwise have received should go to his children, to the exclusion of his wife, if she survived him. With great respect for the opinion to the con-

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trary of the trial judge and of the justices comprising the majority of this court, I feel constrained to record my belief that this is what the testator meant.

JOHNSTON, C. J., and PORTER, J., concur in this partial dissent.

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No. 21,126.

IGNACE TERSINA, *Appellee*, v. THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, and H. F. BROOKS (et al.), *Appellants*.

SYLLABUS BY THE COURT.

INSURANCE—*Loss—Inconsistent Special Findings—Evidence—New Trial.*

The court refused to order judgment for defendants upon the evidence or upon the special findings of the jury, but granted a new trial because the verdict returned by the jury was not supported by the evidence and because the special findings were inconsistent with each other and with the general verdict. *Held*, not error.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed December 8, 1917. Affirmed.

A. S. Wilson, of Galena, and S. L. Walker, of Columbus, for the appellants.

C. A. McNeill, of Columbus, and E. B. Morgan, of Galena, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by Ignace Tersina against the Liverpool and London and Globe Insurance Company, H. F. Brooks, its agent, and W. B. Simms, the deputy state fire marshal, to recover damages for alleged malicious prosecution and false imprisonment. A demurrer to the evidence of plaintiff was sustained as to the defendant Simms. The jury returned a general verdict in plaintiff's favor against the insurance company for \$25, and in favor of the defendant Brooks. This appeal is taken from the court's orders overruling defendants' motion for judgment upon the special findings of the jury and sustaining plaintiff's motion for a new trial.

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Plaintiff's house and most of its contents were destroyed by fire. The property was insured by the defendant company in the sum of \$600. Brooks, the local agent of the insurance company, was notified of the fire, after which he had plaintiff make out a list of the lost articles in the house, and the loss was reported to the insurance company at Chicago. Van Valkenburg, the company's state agent at Kansas City, was directed to investigate and adjust the claim, with the result that he forwarded plaintiff's proof of loss in the sum of \$595.60 to the Chicago office with the recommendation that a draft for the amount be issued. After Brooks received this draft and before he had delivered it to plaintiff, he became suspicious as to the origin of the fire and suspected that claim had been made for property that was not burned. He informed the insurance company of his suspicions, and he testified that he thought it was such a case as should be investigated as provided by law. Van Valkenburg, acting for the insurance company, then reported the matter to the state fire marshal's office. In the investigation that followed the county attorney held an inquisition, at the close of which he did not immediately issue a warrant, but waited until Simms and Brooks again went to Carona, the village in which plaintiff's house was situated, for further inquiry into the matter. Although they did not find more evidence Simms advised the county attorney that he thought a warrant should be issued for plaintiff. At the suggestion of the county attorney Simms then had Brooks draw up a complaint, as the county attorney was busy with other matters, and Simms swore to the same. Plaintiff was arrested and held in jail twenty-four hours pending the obtaining of bond. At the preliminary hearing, after the introduction of the state's evidence, the complaint, at the suggestion of the county attorney, was dismissed. It appears that while the investigation was in progress some attempts were made by the insurance company to compromise the plaintiff's claim, but no settlement was reached and an action was commenced on the policy; but after the dismissal of the prosecution the check formerly withheld was delivered to the plaintiff. The plaintiff expended \$100 in attorney fees, \$10 for an interpreter, and lost ten days' time on account of the arson prosecution. This action was then brought, alleging in sub-

stance that the defendants were in a conspiracy for the purpose of maliciously bringing about the plaintiff's arrest and imprisonment, and of defrauding him out of the amount to which he was entitled under the policy.

The substance of the jury's special findings is that the insurance company was instrumental in instituting the criminal action through the correspondence of their agents setting in motion the machinery of the law through the fire marshal's office; that the insurance company deemed the fire to be of suspicious origin; that it was right for the company to report the fire to the fire marshal's office; that the insurance company committed wrong in instituting criminal proceedings after the inquisition showed no grounds of action; that the cause of the criminal action being instituted was the company's claim that more evidence could be procured; that the inquisition was held for the honest purpose of ascertaining if the fire was incendiary; that Brooks and Van Valkenburg held malice against plaintiff before the filing of the complaint by the fire marshal, and that the cause of such malice was false information; and that the plaintiff did not seek to secure payment for any articles of property that were not burned. The answer to question 6, to the effect that the defendants' claim that they could get more evidence, had caused the criminal action to be instituted against the plaintiff, was set aside by the court on the ground that there was no evidence to support it. The court stated that his ground for not sustaining the defendants' motion for judgment upon the special findings was that they were inconsistent, and that the grounds for the granting of the new trial were erroneous rulings in the admission of testimony for defendants, and that the verdict was contrary to the evidence.

It is insisted by the defendants that the evidence and findings compel a holding that no right of recovery against them had been established, and that this court should direct judgment in their favor. It is true, as the defendants contend, that the insurance company cannot be blamed for investigating cases in which there are grounds for their belief that a fire was caused by a claimant, or that he is claiming for the loss of property which was not in fact burned or injured. Indeed, the officers and agents of a company would be recreant in their duty if



they failed to make a *bona fide* investigation in such cases. The law authorizes the fire marshal to investigate the cause, origin and circumstances of any fire occurring in the state (Laws of 1913, ch. 312, § 5, Gen. Stat. 1915, § 10848; Laws of 1915, ch. 230, Gen. Stat. 1915, §§ 5354, 5355), and no fault can be found with an agent of the insurance company because he called the attention of the fire marshal to the fact that the plaintiff's building had been burned. The court found that the charge made against the deputy fire marshal, as to being in a conspiracy to defraud the plaintiff, was not sustained and he should therefore be dismissed from the case.

This elimination weakened the charge of conspiracy to quite an extent, but the jury have found that two of the agents of the insurance company had acted fraudulently and maliciously in accomplishing the arrest and imprisonment of the plaintiff. The testimony against them is rather weak and unsatisfactory, but we cannot say, as against the ruling of the district court, that the findings of the jury against the defendants were without support, or that there was no testimony worthy of submission to the jury. There was testimony tending to show that after an inquisition had been held by the fire marshal and the county attorney the evidence obtained failed to support the charges made against the plaintiff, and after a search on the following day for more evidence implicating the plaintiff none was found, and yet the agents of the insurance company persisted in securing the plaintiff's arrest. In a letter written by one of the agents he stated that, "it is very questionable in my mind as to the ability of the fire marshal to secure sufficient evidence to convict this assured of arson, but I think by our proposing to pay the amount of his purchases since the fire we can get our policy up," etc. Testimony was given of a remark by an agent of the insurance company to the effect that as soon as the plaintiff and his attorneys learned that the fire marshal was making a thorough investigation of the fire—an investigation which the agents of the company had set in motion—plaintiff would be willing to make a proposition of compromise. There was testimony, too, of a purpose to keep the information from the plaintiff that an investigation was to be made by the fire marshal, and that when the deputy marshal arrived he should be brought into contact with the agent of

the company before he had seen any one else. A little testimony was given that the representatives of the company were expecting that after there had been an investigation and prosecution the plaintiff might be willing to compromise and reduce his claim—a compromise which the agents of the insurance company had in mind always and were willing to make.

The findings did not warrant the verdict. One finding was set aside and there are obvious inconsistencies in the remaining ones. Both parties complain of the conflict in the findings, both attack particular findings on the ground that they are not sustained by the evidence, and both have good grounds for their complaints. Some of the findings are of doubtful import and some conflict with the general verdict, and hence the court could not uphold them nor make them the basis of a judgment.

"When the special findings of a jury are in conflict with the general verdict, and are inconsistent with each other, and are so uncertain and incomplete that this court cannot render judgment on them, it is not error in the court below to grant a new trial for these reasons." (*C. I. & K. Rld. Co. v. Townsadin*, 38 Kan. 78, syl. ¶ 1, 15 Pac. 889.)

Another sufficient ground for the order granting a new trial was error of the court in the admission of testimony. The defendants were allowed to cross-examine the plaintiff as to supposed violations of the prohibitory liquor law, as they had a right to do for the purpose of impairing his credibility, and the extent to which such an examination may go is largely in the discretion of the court. After his denial of the commission of the supposed offense, other witnesses were then called for the purpose of showing that he was guilty, and the real issues of the case for a time were lost sight of and the plaintiff was tried for a public offense. This was an unwarranted inquiry and one likely to have prejudiced the plaintiff. (40 Cyc. 2627.)

No error was committed in granting a new trial.

Judgment affirmed.

No. 21,127.

BENJAMIN MULLARKY, *Appellee*, v. H. A. MANKER, *Appellant*,  
and R. C. POSTLETHWAITE.

## SYLLABUS BY THE COURT.

1. EXCHANGE OF PROPERTY—*Relief on the Ground of Fraud—Evidence.* In an action for relief on the ground of fraud, the evidence held to have been sufficient to warrant submitting to the jury the matter on which the verdict was based.
2. SAME—*Motion to Separately State Causes of Action—Judicial Discretion.* The overruling of a motion to require different causes of action to be separately stated and numbered, being a matter of discretion, is ordinarily not subject to review.
3. SAME—*Demurrer to Petition—Misjoinder of Parties.* Where a demurrer to a petition on the ground of misjoinder is based upon the claim that one of the defendants is not affected by one of the causes of action, the sustaining of a demurrer to the evidence as to that defendant prevents the overruling of the demurrer on that ground from being material on appeal.
4. SAME—*Motion to Strike Matter from Petition.* The overruling of a motion to strike matter from a petition held not to have been prejudicial.
5. SAME—*Evidence.* Rulings admitting evidence held not to have been erroneous.

Appeal from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed December 8, 1917. Affirmed.

*W. R. Mitchell*, of Mankato, *T. F. Garver*, and *R. D. Garver*, both of Topeka, for the appellant.

*R. W. Turner*, and *D. F. Stanley*, both of Mankato, for the appellee.

The opinion of the court was delivered by

MASON, J.: Benjamin Mullarky sued H. A. Manker, asking damages in the amount of \$17,840, on account of fraudulent conduct, of which he alleged the defendant had been guilty. He recovered a judgment for \$3,537.86, from which an appeal is taken. The judgment was based upon a finding that the plaintiff suffered a loss of \$4,840 through the defendant's misconduct, it being found that, except for this particular transaction, he would have owed the defendant \$1,304.14.

1. The principal contention of the defendant is that the finding of this liability on his part was not warranted by the evidence. The following is a brief statement of the means by which the plaintiff, according to his own story, was defrauded of the amount named:

The defendant owned a piece of real estate in Jewell City known as the Kreamer property, which he wished to exchange for a tract of land in Chase county, owned by one S. D. Elyea. Elyea did not care to make this trade, but was willing to exchange his land for a building in La Harpe, owned by the plaintiff. In April, 1915, the defendant negotiated a deal by which the plaintiff was to deed the La Harpe property to Elyea, Elyea was to deed the Chase county land to the defendant, and the defendant was to deed to the plaintiff either the Chase county land or the Kreamer property, as the plaintiff might prefer. This arrangement was carried out to the extent that the plaintiff conveyed his property to Elyea, and Elyea some time later conveyed his to the defendant. On May 10, 1915, a written contract was entered into for the sale by the defendant to the plaintiff of certain property, including 460 acres of growing wheat, valued in the deal at \$20 an acre. In a separate paragraph, however, the plaintiff was credited with \$5,000 on the agreed purchase price, reducing the actual consideration that much. This paragraph was on the first of the two typewritten pages comprising the contract, the signature of the parties being upon the second sheet. After the execution of the contract the paragraph referred to was changed (a new first page being substituted for the original) so that instead of the \$5,000 item being shown as a mere reduction in the purchase price thereinbefore specified, it was made to appear as a credit to be given to the plaintiff in consideration of his releasing the defendant from his obligation to pay the plaintiff for the La Harpe property by making a deed to the Kreamer property or to the Chase county land. In speaking of the written contract, shortly before it was drawn up, the plaintiff told the defendant that it would cover the part of the trade regarding the wheat; that with regard to the La Harpe property they would "check that down as unfinished business and later on make settlement about September 1st." They

then agreed that the price to be allowed should be \$4,840. The plaintiff has never received anything for the property.

The defendant's version of the affair is this: The arrangement for the exchange of property between the plaintiff, the defendant, and Elyea was made, substantially as stated. The plaintiff deeded the La Harpe building to Elyea, and Elyea deeded the Chase county land to the defendant. Prior to May 10, 1915, the plaintiff and the defendant agreed that the latter should convey the Kreamer property in exchange for the property conveyed to Elyea, but should make the deed to the plaintiff's father, to whom the plaintiff was indebted. While matters stood in this condition the written contract was entered into, it being agreed that the plaintiff should have a credit of \$5,000 on the purchase price therein specified, in consideration of allowing the defendant to keep the Kreamer property. As the agreement had already been made that the deed should be executed to the plaintiff's father, the paragraph on the subject was made to contain a provision that the plaintiff was to procure a surrender of his father's rights in the matter.

The jury found specifically that the written contract had been altered after its execution, and the sufficiency of the evidence to uphold the verdict turns largely upon whether any part of it had a tendency to show such alteration. The defendant's argument to the contrary is mainly a summary of a number of circumstances pointing to the extreme improbability of such a change having been made. Granting the force of the considerations suggested, as bearing upon the unlikelihood of a spurious first page having been substituted for the original (that obviously being a necessary incident to the change, if any was made), the reasoning falls short of justifying a reversal. Such a substitution was physically possible, and the plaintiff gave testimony tending to show that it was made. He testified that he heard the contract dictated as it was being written on a typewriter; that the first page was read to him by the writer, but not in the form in which it now appears; that the paragraph in question is not in accordance with the actual agreement of the parties; that no writing in "long-hand (that is, made with a pen) was inserted in his presence, whereas the copy produced contained a number of such interlineations. In the brief of the defendant it is said: "That this contract, when

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signed, was in the same form as when introduced in evidence is shown by an overwhelming preponderance of the testimony." This is a matter, however, upon which the verdict of the jury, having been approved by the trial court, must be regarded as final.

The precise point of controversy between the parties will be made clearer by a somewhat fuller statement. It seems to be admitted that the price named for the growing wheat—\$20 an acre—was excessive, for the defendant testified that "we figured the wheat price was inflated." The plaintiff asserts that the credit of \$5,000 agreed to be given to him in the contract was merely a means of reducing the inflation. He admits that there was an understanding that he was to procure (as he did) a release from his father of any claim to the Kreamer property, but he gives this explanation regarding the matter: He and the defendant had disagreed as to the terms on which the Kreamer property was to be deeded to him in exchange for the La Harpe property, the defendant demanding \$500 boot, which he refused to pay. In that situation the plaintiff's father offered to buy the Kreamer property from the defendant at a valuation of \$8,000, and the offer was orally accepted; but no writing was executed, and nothing further came of this negotiation. The plaintiff insists that what he was to procure from his father was merely a release of any claim to the property under this unenforceable oral agreement—a purely formal matter, as his father had invested nothing in the property and had acquired no legal right whatever regarding it.

The defendant, on the other hand, as already indicated, asserts that the previous agreement had been that he was to give up the Kreamer property to compensate the plaintiff for the La Harpe property, but was to make the deed to the plaintiff's father because the plaintiff owed him \$2,000; and that in the negotiations leading up to the wheat deal it was agreed that a \$5,000 credit should be given to the plaintiff in consideration of the defendant being allowed to retain the Kreamer property and being released from his liability on account of having obtained the benefit of the La Harpe property. The written contract in its present form is so worded as to support this version of the transaction.

There was sharp conflict in the evidence. No purpose would be served in going into greater detail on the subject. We con-

clude that the verdict must stand unless affected by some ruling on a question of law.

2. The petition recited a number of transactions to which no reference so far has been made in this opinion. The defendant contends that several causes of action were stated, and complains of the overruling of a motion to require them to be separated and numbered. Under the code of civil procedure as it existed prior to 1909 different causes of action set out in the same pleading were required to be separately stated and numbered. (Gen. Stat. 1901, § 4522.) The section imposing this requirement was omitted in the revision of that year, and at present the ruling on such a matter is expressly committed to the discretion of the trial court (Civ. Code, § 122, Gen. Stat. 1915, § 7014), and is therefore not subject to review. (*Cribb v. Hudson*, 99 Kan. 65, 160 Pac. 1019.)

3. A demurrer to the petition on the ground of misjoinder was overruled. It is urged that several causes of action were stated in the petition, one of which did not affect R. C. Postlethwaite, who was joined as a defendant. A demurrer to the evidence was sustained as to Postlethwaite, who thus for practical purposes ceased to be a party, thereby rendering immaterial the question whether his being a defendant occasioned a misjoinder.

4. A motion to strike matter from the petition was sustained in part and overruled in part. It is contended that error was committed in allowing any of the challenged matter to remain in the pleading. Granting that the allegations objected to were redundant or irrelevant, no prejudice to the defendant is apparent. (*Harris v. Morrison*, 100 Kan. 157, 163 Pac. 1062.) It is argued that the superfluous matter, containing charges of fraudulent intent and conduct, tended to inflame the jury against him. As the recovery was had upon a single item, and upon the basis of its amount having been agreed to, such an effect of the language complained of does not seem to be established.

5. A final complaint relates to the admission of evidence. While the plaintiff was on the stand he was asked by his attorney to state what was said in a conversation between himself and the defendant on September 7. It is contended that the answer was incompetent. It does not appear to be very

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material, but in any event the question was not improper, since it did not necessarily call for anything that was not competent evidence. Nothing is preserved for review in this connection, since the defendant did not ask to have the question made more specific, and did not in any way attack the answer. (*Stone v. Bird*, 16 Kan. 488.)

A day or two after the signing of the contract, its draftsman, with whom it had been left, and who at the time was the defendant's attorney, had his stenographer make a copy of it (or what was supposed to be a copy), which he certified as correct and filed with the register of deeds. This purported copy was not a literal transcript of the instrument produced in court, the language being different in a number of instances, although none of these differences affected the essential meaning of the contract. The plaintiff was permitted to introduce this copy in evidence, over the objection of the defendant. As the copy was declared to be accurate and made public by the attorney of the defendant, acting apparently in his behalf, and as it did not conform strictly to the instrument asserted by him to be the original contract, the genuineness of which was attacked by the plaintiff, we think the court was justified in admitting it for whatever bearing it might be thought to have upon the question whether a substitution for the first sheet had been effected.

The judgment is affirmed.



Nos. 21,128-21,130.

(Consolidated.)

/ No. 21,128.

THE HOME STATE BANK, *Appellee*, v. SCHOOL DISTRICT NO. 17  
IN WYANDOTTE COUNTY, *Appellant*.

No. 21,129.

THE MINNESOTA AVENUE STATE BANK, *Appellee*, v. SCHOOL  
DISTRICT NO. 17 IN WYANDOTTE COUNTY, *Appellant*.

No. 21,130.

THE COMMERCIAL NATIONAL BANK, *Appellee*, v. SCHOOL DIS-  
TRICT NO. 17 IN WYANDOTTE COUNTY, *Appellant*.

## SYLLABUS BY THE COURT.

1. **REFERENCE**—*Findings of Referee Confirmed—Findings of Fact Conclusive.* Where a defendant files a motion asking the court to approve and confirm the findings of fact made by a referee, and to set aside the referee's conclusions of law, and the court confirms and approves both the findings of fact and conclusions of law, the defendant cannot question the correctness of the findings of fact.
2. **SCHOOL WARRANTS**—*Drawn on Empty Treasury—Warrants Became Floating Debt.* The fact that at the time a school warrant is issued there are no funds in the hands of the treasurer with which to pay it, does not render the warrant illegal or void. When the warrant is presented for payment, it becomes the duty of the treasurer to indorse it "Not paid for want of funds," and it then becomes a floating debt of the district.
3. **SAME**—*Action on Warrants—Pleadings—Departure.* Where the answer of a school district to an action upon school warrants pleads that the warrants were unlawfully issued and are without consideration and void, a reply which alleges that the defendant received and used the property and services for which the warrants were issued, that the acts of its officers in issuing the warrants were ratified by the electors of the district, and that defendant is estopped to question the validity of the warrants, does not set up a new cause of action nor constitute a departure.
4. **SAME**—*Assignment—Rights of Assignee.* By the assignment of a school warrant the assignee becomes the owner of whatever claim the original holder had against the district for the indebtedness evidenced by the warrant.
5. **SAME**—*Amount of Judgment.* In an action on a school warrant which has been issued for a sum in excess of the amount due the creditor, but which is otherwise legally issued, the court may properly give judgment for the amount actually due on the indebtedness evidenced by the warrant.

Appeal from Wyandotte district court, division No. 2; FRANK D. HUTCHINGS, judge. Opinion filed December 8, 1917. Affirmed.

*Justus N. Baird*, of Kansas City, for the appellant.

*L. W. Keplinger, C. W. Trickett, E. A. Enright, E. S. McAnany, M. L. Alden, and Thomas M. Van Cleave*, all of Kansas City, for the appellees, *Samuel Maher*, of Kansas City, of counsel.

The opinion of the court was delivered by

PORTER, J.: These cases involve the same questions and were consolidated and submitted together. Each of the banks brought suit against the school district on school warrants and recovered judgment, from which the school district appeals.

The petitions alleged that the school district issued its warrants, setting out copies of the warrants, their assignment to the bank, and asked judgment for the amounts due. In addition to a general denial the answer alleged that at the time the warrants were signed, T. E. Moody was not a duly elected and qualified director and officer, and was not a *bona fide* resident of the school district; that James H. Ewing, at the time the warrants were signed, had no right to act as treasurer; that the warrants, which were drawn by Stephen Lockridge as clerk, were for sums in excess of the moneys in the hands of the alleged treasurer, or which had been apportioned to or raised by the district for the payment of warrants; that the warrants were without consideration, illegal, and void.

The reply contained a general denial and alleged that if any warrant sued on was invalid for any cause when issued, the property and service for which it was issued were received and used by the defendant, and thereby the defendant ratified and validated such warrant and became liable for its payment; that the acts of the officers and agents in issuing the warrants were ratified by the electors of the school district at subsequent regular school meetings; that the defendant appropriated the services and used the property received without objection; and that the electors of the district met in annual and special meetings each year with full knowledge that the warrants had been issued and of all the facts pertaining thereto.

The first complaint is the overruling of a motion to strike from the reply all averments tending to show that the district was liable because it had qualified or ratified the issuance of the warrants; the theory of the defendant being that these allegations of the reply constitute a departure, and further that plaintiff was thereby seeking to recover upon a *quantum meruit*, which was barred by the statute of limitations. There was no departure in the pleadings. The actions were brought upon school warrants; the answer challenged their validity; the reply merely sought to avoid this portion of defendant's answer by alleging that the school district received the benefit of the work and labor and the indebtedness represented by the warrants and was therefore estopped to plead the invalidity of the warrants. No new cause of action was pleaded by the reply. (*Hunter v. Allen*, 74 Kan. 679, 88 Pac. 252, and authorities cited in the opinion; *Snyder v. Wheeler*, 81 Kan. 508, 106 Pac. 462; *Sturgeon v. Culver*, 87 Kan. 404, 407, 124 Pac. 419.) The warrants are not negotiable instruments, and their assignment to the bank by the original payee transferred to the bank whatever claim the original owner had against the district for the indebtedness evidenced by them. (*School District v. Dudley*, 28 Kan. 160.)

The trial court sent the case to a referee, who filed an exhaustive report finding, among other things, that from January 1, 1908, to the 12th of January, 1911, James H. Ewing occupied the office of and acted as treasurer of the school district; T. E. Moody occupied the office of director, and Stephen Lockridge occupied the office of clerk of the defendant. These were the members of what is known as the old board which issued the warrants sued on. The findings show that about August 1, 1911, S. C. Hogg succeeded Ewing as treasurer, Frank C. Brown succeeded Moody as director, and John W. Carter succeeded Stephen Lockridge as clerk. These constitute what is known as the "new board." The referee finds that there was dissatisfaction with the acts of the officers of the old board as early as the school meeting in April, 1910, and that there were two factions in the district, resulting in a grand jury investigation.

As to the warrants sued on, the referee finds that they were all regularly ordered, executed and issued by action of the

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officers of the district as a board. It also appears that in 1908 the district, at a meeting regularly called, ordered the erection of a new school building, but the amount to be expended was not limited or specified. The building was erected in 1908 and occupied for school purposes in September of that year. At that time the school site consisted of about one-half acre, the law requiring not less than one acre. In 1909 the school board, under authority from the district given at the annual meeting, contracted for the purchase of four lots adjoining the original site and these lots were openly used as part of the school site until late in the summer of 1912, when the new board, by consent of the vendor of the lots, canceled the contract, issuing two warrants in payment for a release, one of these having been paid by the district, the other being one of the warrants sued on.

It appears from the findings that there were but two families of the Caucasian race living in the district and that all of the district officers were of the African race; that the schoolhouse was used as a community center, open at all times, not only for school purposes, but for lodge meetings, church and social affairs, band practice, and was frequently resorted to by loafers and persons who destroyed and damaged the property; that the doors and windows were often knocked out and the furnace was partly wrecked; that most of the construction of the building and improvements was done by day work, the laborers with few exceptions being residents of the district.

The findings recite in detail the purposes for which the various warrants were issued, the annual meetings of the district at which the number of outstanding warrants were reported. It appears that all the claims, vouchers, books of record and documents belonging to the district were turned over to the prosecuting officers for use before the grand jury in 1911 and have either been lost or destroyed. The referee finds that in some instances warrants were drawn for illegitimate purposes and certain others were drawn in excess of any sum received by the district in return, and finds that not to exceed 50 per cent should be allowed on certain of these warrants. There is a finding that after certain bonds, issued for the purpose of paying for the building, had been found insufficient, the board began to issue warrants stamping them "Not

paid for want of funds," and that this led to a loss of credit and depreciation in the value of the warrants of the district, and creditors refused to accept them at par. In many instances, to overcome the difficulty, warrants were drawn for such sum as when discounted at the banks would net the amount of the indebtedness, and in some cases where laborers and material men would not accept warrants, a warrant would be drawn to a single individual for such sum as when discounted at the bank would yield the net amount necessary to discharge the claims; that in one instance a warrant was drawn in favor of the treasurer of the district in order to pay a bill for lumber used in the construction of the building; in other instances a warrant to cover the payroll for a number of laborers and mechanics was drawn payable to the foreman in charge of the work.

As conclusions of law the referee found that at the time of the issuance of the warrants sued on, Ewing, Moody and Lockridge were officers *de facto*, if not *de jure*, of the district, except as to one warrant, which was issued by the new board.

The defendant filed a motion to confirm the referee's report as to findings of fact and to overrule the conclusions of law. The court granted part of the motion and overruled the rest. It confirmed the report of the referee as to findings of fact and approved the conclusions of law reached by the referee, and rendered judgment for the plaintiffs. It is, of course, too late now for the defendant to claim that the trial court erred in confirming the report as to the findings of fact. The principal contention of the defendant is that the tax levy made by the district for the years 1909, 1910, and 1911 was in excess of the levy authorized by law for school purposes, and that it necessarily follows that the warrants are void. None of the evidence in the case has been brought to this court, and the findings of fact do not sustain the contention that the tax levy was in excess of that authorized by law for school purposes. Besides, it does not necessarily follow that a warrant is void because when it is drawn there is no money in the hands of the treasurer to pay it. It is true, as defendant asserts, that the statute (Gen. Stat. 1915, § 8956) makes it the duty of the clerk of the district to draw orders on the treasurer for moneys in the hands of the treasurer, but section 8929 of the General Statutes of

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1915 recognizes that school districts frequently have "a floating indebtedness consisting of outstanding school orders." Section 11699 of the General Statutes of 1915, which relates to all warrants or orders drawn on public treasurers, provides that

"in case there is not sufficient money in the hands of such treasurer to pay any warrant when presented, he shall indorse thereon a proper registered number, in the regular order of its presentation, and the words, 'Presented and not paid for want of funds,'"

and the same section provides that no warrants shall be received for taxes by any county treasurer unless he shall have in cash a sufficient sum to redeem all warrants having such priority over the warrants so offered for taxes. Other provisions of the statute authorize the funding of outstanding or floating indebtedness of school districts and recognize that warrants are very frequently drawn when there is no money in the treasury to pay them. The warrant is *prima facie* valid, notwithstanding the fact that at the time it is drawn there is no money in the hands of the treasurer to pay it. Among the powers given to school districts at their annual school meeting is the power to vote a sum annually, not exceeding the limit fixed by law, as the meeting shall deem sufficient, for various school purposes *and for the payment of any floating indebtedness of the district*. (Gen. Stat. 1915, § 8913.) The provision that the clerk of the district shall draw orders on the treasury for the money in the hands of such treasurer is a general provision, and of course does not limit the power of the officers to make contracts binding upon the district, or to audit accounts against the district and to issue to a creditor a warrant as evidence of the amount due him. The findings of the referee, approved by the court, are that the school district received the consideration for the warrants included in the judgments, and not only this, but that the district at the various meetings ratified the action of the officers in issuing the warrants. (*School District v. Swayze*, 29 Kan. 211, 218.)

The judgments are affirmed.

No. 21,131.

ROBERT C. POSTLETHWAITE, as Administrator, etc., *Appellee*,  
v. FRANK P. EDSON and JESSIE L. MCCABE, *Appellants*.

## SYLLABUS BY THE COURT.

1. **CONSTRUCTION OF WILL—Life Estate—Remainder to Children.** The former opinion (*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802) remains as the deliberate holding of this court.
2. **SAME—Judgment against Testator—Homestead—Land Subject to Payment of Testator's Debts.** A husband and wife mutually willed their property, including a homestead, to their survivor for life with power of disposal, remainder to their children. It was occupied by the devisors, and by the surviving wife until her decease, the children then having homes elsewhere and not occupying the land devised. A judgment obtained against the father was kept alive as to his estate by revivor against his administratrix. *Held*, that the children took the land freed from its homestead character, and it could by this suit be subjected to the payment of the judgment.
3. **SAME.** The homestead character of real estate depends on family occupancy—not on the source of title.
4. **SAME—Judgment Lien—Interest of Judgment Debtor in Land.** Only the interest of the judgment debtor could be appropriated, and it was error to sustain a demurrer to that part of the amended answer setting up that the homestead was acquired by the joint efforts and money of the husband and wife, and held by them as tenants in common.
5. **SAME—Unambiguous Will—How Construed.** The will not being ambiguous the trial court correctly refused evidence explanatory of the devisor's intentions, and properly struck from the answer allegations of what such intentions were.
6. **WILL—Not Alienation of Homestead.** The will was not an alienation or conveyance of the homestead.

Appeal from Shawnee district court, division No. 2; GEORGE H. WHITCOMB, judge. Opinion filed December 8, 1917. Modified.

*Eugene S. Quinton*, of Topeka, for the appellants.

*T. F. Garver*, and *R. D. Garver*, both of Topeka, for the appellee.

The opinion of the court was delivered by

WEST, J.: When this case was here before, it was stated in the brief of the plaintiff: "Defendants do not claim any

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homestead rights." (p. 10.) In the defendants' brief were the following statements:

"The appellants claim that the instrument is a joint will by which Mary Edson took a life estate with a remainder to Frank P. Edson and Jessie L. McCabe, and if so the property is subject to be taken in this action.

"It is admitted that Frank P. Edson and Jessie L. McCabe . . . had never resided upon or occupied this property as a homestead for a long time prior to all matters herein presented.

"If the absolute fee simple title and homestead right did pass, under this mutual will, upon the death of Willis Edson to Mary Edson, the survivor, then it must follow that Frank P. Edson and Jessie L. McCabe inherited that legal title and the property directly and fully and completely, from Mary Edson, against whom there were no claims or debts. From the death of Willis Edson to the death of Mary Edson, this property, as a homestead, remained clear and free from the claims of any creditors or either of them. If so, then the legal title to this homestead having vested upon the death of Willis Edson in Mary Edson, that too must have remained clear and free, with the homestead right, from the claims of creditors, there being no claims or debts of Mary Edson at her death. The same unincumbered title and property must of necessity have passed unincumbered to the heirs, Frank P. Edson and Jessie L. McCabe. This conclusion is inevitable, if, as a matter of law the legal title to this homestead, by virtue of this mutual will, passed unincumbered to Mary Edson.

"So, in this case, under the mutual will, the homestead and legal title thereto vested in the survivor clear and free from the debts of the deceased husband. Having once, then, vested free from debts in an innocent party or purchaser, it could not be divested." (pp. 6, 9, 12, 17.)

These quotations are made to demonstrate that the controversy when first here centered on the question whether the survivor took a fee or a life estate with power of disposal, remainder to the children, and that it was then insisted that if the former, the homestead character of the land remained even when inherited by the children, who did not claim to occupy it as a homestead. Hence in the opinion (*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802) it was said:

"Mary Edson survived her husband, remaining in possession of the homestead during her life. She left the defendants as her sole heirs who claim no homestead rights. The plaintiff takes the position that the will devised a life estate to Mary Edson with full power of disposition,



remainder to the defendants, and if this be the proper construction it is conceded that the property is subject to be taken in this action." (p. 445.)

In the elaborate petition for a rehearing there was no complaint of this statement.

Near the close of the opinion it was said :

"It is fairly clear that the intention was that the survivor should have complete dominion over the estate during her life, including the full power of disposition, but that as she would be likely to retain the estate or portion thereof such portion was to vest personally in the children to take effect at her death, that is, the present estate in such portion was to vest in her for life with the power of disposition, remainder to the children." (p. 451.)

This conclusion, reached after a painstaking examination and consideration, we are satisfied with and it must remain as the deliberate holding of this court.

The case was first here on appeal from an order overruling a demurrer to the answer. When it reached the lower court the defendants amended their answer, parts of which were stricken out on motion of the plaintiff and a demurrer to the remainder was sustained, from which orders this appeal is taken. Hence, the question now before us is the claimed error in such ruling. The parts stricken out amounted to an allegation that the Edsons talked over the making of the will and expressed their intentions and desires, counseled with an experienced lawyer who drew the instrument and suggested a certain addition with which the testators were pleased. In other words, the trial court refused to permit the defendants to go into the conversations and intentions of the makers of the will, on the theory doubtless that it is plain on its face and needs no extrinsic aid for its proper construction. The remainder of the amended answer pleaded the homestead character of the land devised while occupied by the parents or their survivors, the separate homes elsewhere occupied by the defendants, that the homestead was procured by the joint efforts of the devisors and held by them as tenants in common.

Error is assigned on sustaining a demurrer to all of the remaining answer except the general denial, because the judgment of the plaintiff was never a lien on this property; because the judgment was not against Mary Edson, the joint owner with her husband of the homestead; because the will is

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ambiguous and susceptible to explanation of the intention of its makers, and because it carried a fee to their survivor. The last reason is disposed of by the former decision. The first may be conceded, this suit being brought for the very purpose of subjecting the land to the payment of the plaintiff's judgment, which would be idle if it were already a lien thereon. This leaves only the second and third for consideration—the effect of the alleged one-half or joint ownership by Mrs. Edson, and the claimed ambiguity of the will.

A "partial transcript" before us contains the following:

(Counsel for plaintiff): "It is admitted that the title of record to the lots described in the petition was in Willis Edson at the time of his death and at that time and some time previous said premises had been occupied by Willis Edson and his wife as their residence and home-stead.

(Counsel for defendants): "That is all right.

(Mr. G.): "It is further admitted Mary Edson elected to take under the will as probated, and thereafter, in April, 1914, died without having made any other disposition of said property.

(Mr. Q.): "That last statement in there I want taken out, 'without having made any other disposition of her property.'

(Mr. G.): "I offer in evidence the original answer filed in this case by the defendants, which states some of these facts.

"I offer the inventory filed in the probate court by Mary Edson as administratrix of the estate of Willis Edson, deceased.

(Mr. Q.): "I object to it as incompetent, irrelevant and immaterial and not the best evidence.

(The Court): "Overruled.

"The inventory in question is in substance as follows, to wit:

"I, Mary Edson, residing at Topeka, Kansas, administrator of the estate of Willis Edson, deceased, do hereby make and return upon oath the following inventory of all the moneys of the deceased which are by law to be administered and which has come into my possession or knowledge and also of all the real estate of the deceased. I further declare upon oath that the estate of said deceased consists only of the property herein scheduled and listed, to wit: Except household goods exempt under the law.

"Lots 246 and 248 Eighth avenue, Topeka, Shawnee County, Kansas, \$3,750."

But aside from all this, and conceding for the moment only that the property was acquired and owned by the parents as alleged, it was still the subject of their testamentary direction, and as already construed their mutual will gave to the sur-

vivors a life estate with power of disposal, remainder to the children. True, while the homestead of the devisors or their survivor, it was property towards which the eye of their creditors could be turned in vain, but had it ceased to be such homestead by abandonment it would thereby have become like any other property they may have owned, subject to their debts. While they could not have defrauded their creditors by selling to a stranger, this is because while still occupied by them it was exempt. Again, had the survivor died leaving the children in possession as part of her family, it would still have been exempt, not only from the debts of the devisors, but from the debts of the children so long as they might rightfully continue to occupy the property as their homestead. The entire theory of homestead exemption is the setting apart of real estate free from the claims of creditors, not the giving to any family or heirs the right to have a homestead and claim also as exempt other real estate because inherited from or devised by those whose homestead it was.

It has been held that when a husband with his own money purchases land in his wife's name for the purpose of placing it beyond the reach of his creditors and then makes improvements thereon and occupies it with his family as a homestead, such transactions are not fraudulent as to subsequent creditors of the husband. And that in such case it makes no difference whether the husband or wife owned the money or in whose name (of the two) the title was taken. *Hixon v. George*, 18 Kan. 253. In *Ashton v. Ingle*, 20 Kan. 670, it was decided that a judgment against an owner of nonexempt real estate attaches thereto although at the time of the levy it may be occupied as the homestead of the owner. In *Dayton v. Donart*, 22 Kan. 256, an owner of a homestead died intestate leaving many debts and no personal property with which to pay them, and no other real estate. It was held that the title descended to the widow and children just the same as if it were not occupied as a homestead,

"except that it descends to them subject to a certain homestead interest vested in the widow and such of the children as occupy the homestead at the time of the intestate's death." (Syl. ¶ 1.)

That if the property be sold while still occupied as a homestead by the widow and one or more of the children the title

passes to the purchaser free from debts, although the property may afterwards be abandoned as a homestead by the widow and children. In the opinion it was said:

"But evidently from the statutes they hold the property as their absolute property, free from debts and division only while some of them occupy the same as their homestead. If they all abandon the property as a homestead, it then becomes subject to debts and division the same as though it never was a homestead. This homestead right is probably just like any other homestead-exemption right, except that it is held by the occupants (prior to the widow's marriage, and prior to all the children's reaching their majority) free from division or partition, as well as free from debts; and when it is abandoned as a homestead (if not previously sold), it becomes liable for the intestate's debts." (p. 270.)

*Stratton, Adm'r, v. McCandliss*, 32 Kan. 512, 4 Pac. 1018, was to the effect that a homestead left by the husband and occupied by the widow as a homestead until her decease was thereupon subject to sale for the payment of the owner's debts. In another case the homestead owner died leaving a widow and several children all of whom had reached majority. He had devised one-half to the widow and one-quarter to the son who resided upon the homestead until partition by which the widow was allotted one-half the homestead, the son one-quarter and the remaining one-quarter set off to the other heirs. The widow sold her portion and abandoned the homestead. The heirs to whom the one-quarter was awarded never resided upon the homestead and after the abandonment by the widow their one-quarter was unsold and unoccupied. The personal property left by the deceased was insufficient to pay the debts of the estate, and it was held that the one-quarter last mentioned was subject to sale for the payment of debts and cost of administration. (*Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694.) In the opinion it was said:

"It has been settled that the death of the owner of the homestead does not transfer the title absolutely and unconditionally to the widow and children. It descends to them the same as other real estate owned by the deceased, except that it is subject to the homestead interests. So long as it retains its homestead character it cannot be sold to pay ordinary debts, nor can there be a compulsory division and distribution. While it is so occupied it may be conveyed by the persons in whom the homestead interests vest, and the title to the property or any interest therein will pass free from any liability for the ordinary debts of the estate. Abandonment by them, however, will destroy the homestead interest, and when it is abandoned it becomes subject to the debts of the

estate, the same as other lands which were never impressed with the homestead character." (p. 89.)

In *Allen v. Holtzman*, 63 Kan. 40, 64 Pac. 966, the husband died leaving a will devising the property to the wife, who elected to take thereunder and mortgaged the land while occupying it with her children, to secure a personal debt, and it was held that such mortgage was a valid incumbrance. It was said in the opinion:

"After the husband's death and the election of the wife to take under the will, she took the whole estate. The children got none. Their homestead rights in the land were no greater after the death of their father than before." (p. 41.)

In *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, the widow who continued to occupy the homestead after the death of her husband was held to be entitled to so occupy the land free from forced sale for the payment of the husband's debts, and to so do after electing to take under his will devising the homestead to her. When a wife after the death of her husband occupies the homestead alone it is exempt as to her own creditors, as well as those of her husband's estate, regardless of which spouse held the legal title. (*Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273.)

It is insisted that the land cannot be appropriated to the payment of the judgment because the latter has not been revived against the defendants. It was revived against Mary Edson, as administratrix, July 8, 1912. She died April 4, 1914, and this suit was begun May 4, 1914. Whatever estate Willis Edson left was, unless exempt, subject to appropriation for the payment of his debts. Mary Edson by his will took the property devised to her thus burdened, unless exempt, and thus subject when such exemption should cease. By the same mutual will the property passed to the children and would have continued exempt from the debts of Willis Edson had it been and continued to be the children's homestead. But as they did not occupy it they took it subject to the debts of their father, the judgment against his estate having been kept alive. The judgment, if not a lien on the land, could be made one because the homestead shield had been lowered by the cessation of homestead occupancy. Had they by the will taken other land on which no claim of homestead could have been made

they would, of course, have taken it burdened with liability to appropriation for the payment of his debts. Having taken this land, to which no homestead claim could longer be made, they took it also thus burdened.

But it is urged that this could at most be true only as to such interest as Willis Edson actually owned, and that if he owned but a half interest this is all that could be appropriated; hence, the importance of permitting the defendants to show such half ownership only. It is true that only the actual interest owned by the judgment debtor could be reached. (*Hixon v. George*, 18 Kan. 253; *Holden v. Garrett*, 23 Kan. 98; *McCalla v. Knight*, 77 Kan. 770, 94 Pac. 126; *Emery v. Bank*, 97 Kan. 231, syl. ¶ 3, 155 Pac. 34.)

While it is vigorously asserted, and as vehemently denied, that evidence as to ownership was received under the general denial, the supplemental abstract contains the statement that none was introduced. The defendants had a right to show if they could that their father owned only one-half the land, for in that event their loss by its appropriation to the payment of his debt would be cut in two.

It was error, therefore, to sustain the demurrer to this part of the amended answer.

But it is insisted that Willis Edson could have deeded the property, freed from its homestead character, and by his will he accomplished the same thing, and, therefore, vested the title in his wife freed from the claims of his creditors; and that the children also took the property thus freed. As counsel says in his brief—

"If the fee title passed to the children and a life estate only to the wife, it still was a 'disposition' of the property while occupied as a homestead, that transferred the fee to the same free from debts of creditors."

In his reply brief he asserts that—

"The homestead may be transferred to the children by a will, free from debt, the same as it may be made a gift to a stranger."

In *Dayton v. Donart*, 22 Kan. 256, it was said:

"They say that the first moment of *bona fide* occupancy by the widow and children so fixed the title in the occupants that no subsequent abandonment by them would have the effect to expose the property to liability for the payment of Church's debts. Now, if mere occupancy alone for any period of time, long or short, could have the effect to so free the land from liability for Church's debts that no subsequent abandonment

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of the premises would expose them to such liability, we should think that under the statutes a moment's time would be just as good as any longer period of time. But in our opinion no period of time, however long, is sufficient to give absolute title, free from debts, if the debts remain unpaid and not barred by the statute of limitations." (p. 268.)

In *Comstock v. Adams*, 23 Kan. 513, the court had under consideration section 8 of the descents and distributions act providing that one-half in value of the husband's estate of which the wife had made no conveyance shall be set apart, etc.

It was argued that the term conveyance should be given its broad and general sense, so as to include the conveyance of the property by will, but the court said:

"The word 'conveyance', as used in the proviso of said section 8, clearly does not include a will. A will is never a conveyance. A conveyance operates in the lifetime of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will 'a conveyance,' 'which the husband has made.' It is the death that transfers the property." (p. 524.)

In *Martindale v. Smith*, 31 Kan. 270, it was held that a husband could make a valid will giving a homestead to his wife, and that as against an heir who did not occupy the property as a homestead it would take effect immediately after the death of the testator and after the probate of the will, although the will stated that the testator devised the property to his wife, after paying all his legal debts. In the opinion it was said:

"When death occurs, the title to the property of the person dying must be transferred to some person. It cannot remain in the deceased; and the will simply designates where the title shall go." (p. 273.)

The claim of counsel that the will could not take effect until the payment of the debts was thus disposed of:

"As against George Waybright, the heir and his grantees, we think the will took effect immediately after the death of the testator and the probate of the will, and such death and will immediately transferred the title to the property to the testator's wife, subject possibly to the payment of the debts of the deceased, and subject possibly to his wife's homestead interests." (p. 274.)

The language last quoted leaves the question now before us quite open.

In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, a husband and wife occupied the homestead owned by her, the title being in

her name, she having no children, and it was held that she could by will, without her husband's consent, devise a one-half interest to a third person, so that after her death such third person could take such interest. It was argued that the will amounted to an alienation of the estate, which could only be accomplished by the joint consent of the husband and wife.

"We think these views are utterly untenable. A will never *divests* the owner of his property or of any interest therein. No interest passes by the will to the intended devisee; nothing that he can sell, or transfer, or incumber; nothing that will pass from him to heirs or that he can devise or bequeath; and the will may be revoked by the testator immediately after its execution or at any time afterward and before his death. A person might execute a thousand wills for the same property, yet no one of such wills would *transfer* anything; but when the testator should die the devisee mentioned in the last will executed would, under and *by virtue of the statutes*, take the property. It would not be the will, however, but death that would take the property *from* the testator; and it would be death, the statutes, and the will, all operating together, that would *confer* the property upon the devisee." (p. 611.)

Section 8262 of the General Statutes of 1915 provides that in case any person be imprisoned for life his estate shall be disposed of as if he were naturally dead.

In *Smith v. Becker*, 62 Kan. 541, the meaning of the words "disposed of" were construed and it was said:

"The words 'disposed of' are not in our judgment broad and comprehensive enough to reach to and embrace that act of the law which vests the ownership of property in an heir by inheritance. . . . It is an inapt expression to say that when an estate is cast by descent on the heir by the death of the owner it has been *disposed of*." (pp. 542, 543.)

A California decision was cited to the effect that a statute giving the husband absolute power to dispose of community property ought not be extended to a disposition by devise.

The fourth section of the syllabus in *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, reads as follows:

"Upon the death of her husband a wife may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts." (Syl. ¶ 4.)

It was argued that taking under the will necessarily implied taking subject to the debts of the testator, in view of the statute authorizing one to devise his lands subject to the rights of creditors, but it was held that by the will the title was



devised, and she elected to take thereunder; there was no hiatus in her occupation of the premises as a residence and the homestead privilege was not disturbed, any more than it would have been had her husband deeded the lots to her in his lifetime, while she was occupying them as a homestead.

"And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will of them was subject." (p. 506.)

In *Compton v. Gas Co.*, 75 Kan. 572, 89 Pac. 1039, holding that the widow owning an undivided half of the homestead may lease her interest subject to the rights of those occupying the premises as a homestead, it was said:

"As was held in *Gatton v. Tolley*, 22 Kan. 678, such sale or alienation is always subject to the right of the heirs to continue to occupy the premises as a homestead until the widow marries, the youngest child becomes of age or the homestead is abandoned." (p. 575.)

In a note to this decision found in 10 L. R. A., n. s., 787, may be found numerous authorities more or less in point, but, like other decisions from other states, they are so dependent on local statutes as to be of little, if any, assistance.

See *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, already referred to. From these citations it is manifest that there is evolved the settled rule that a will is not a conveyance, and does not effect an alienation of real estate, and is not a disposal of it in the ordinary sense of the term. When, therefore, the widow took under the will, she took subject to the husband's debts, in case they should be kept alive and occupancy as a homestead should cease. When the children took by virtue of the same will, their title was not expanded, increased or enlarged over that which the widow acquired on the death of her husband. While if they had been in occupancy as a homestead, it would have continued free from their father's debts, it was only free while such occupancy should continue and no longer.

As to the claim of ambiguity and the consequent propriety of showing the real intent of the devisors, it must be observed that while, as stated in the former opinion, support could be found for a different legal conclusion touching the meaning of the will as drawn, the document is not ambiguous but clearly

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within the rule of construction already announced, and hence there was no call and no room for evidence explanatory of intention. (*Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25; *Morse v. Henlon*, 97 Kan. 399, 155 Pac. 800.)

The judgment is modified as to the sustaining of the demurrer, and the cause is remanded for further proceedings in accordance herewith.

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No. 21,132.

C. B. BRUCE, *Appellee*, v. E. R. HAYES, doing business as THE HAYES PRODUCE COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. CONTRACT—*Sale of Melons—Telegrams—Evidence for Jury*. Under the facts disclosed by the plaintiff's evidence, and stated in the opinion, it was not error for the court to overrule a demurrer to that evidence.
2. SAME—*Trial—Instruction—No Error*. As against a defendant, there is no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify the instruction.

Appeal from Shawnee district court, division No. 2; GEORGE H. WHITCOMB, judge. Opinion filed December 8, 1917. Affirmed.

*D. H. Branaman*, of Topeka, for the appellant.

*Hugh T. Fisher*, *M. O. Lock*, and *E. B. Smith*, all of Topeka, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendant appeals from a judgment rendered against him for \$135, the price that he had agreed to pay to the plaintiff for a carload of melons.

1. The principal question arises on an order overruling the defendant's demurrer to the plaintiff's evidence. That evidence tended to prove the following facts:

On July 31, 1914, the plaintiff telegraphed to the defendant from Verden, Okla., as follows:

"Could n't we turn you two cars Tom Watson melons, one 24 and one 28 pounds average. They are fine. Give us your best offer as competition very sharp. Melons scarce."

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The defendant replied, by telegraph:

"Want both cars. Will pay \$225 for them. Must load them heavy and fancy stock. Wire car number, route Rock Island, confirm."

On August 1, the plaintiff sent the following telegram to the defendant:

"Have car 28 pound average one half Toms one half Ala. Sweets well loaded and fancy at one hundred thirty five answer."

To that telegram the defendant replied on the same day:

"Ship car route Rock Island at Chickasha."

On those telegrams, the plaintiff, on August 1, 1914, and immediately after the receipt of the last telegram, shipped a car of melons to Topeka, billed to himself, with directions to notify the defendant. The car arrived in Topeka at 8 a. m. on August 4, 1914. The bill of lading, with draft for \$135 attached, drawn on the defendant by the plaintiff, did not reach Topeka until August 6, when it was presented to the defendant for payment, and payment was by him refused. On August 3, the defendant telegraphed the plaintiff as follows:

"Can't use melons now."

And on August 4, again telegraphed the plaintiff:

"Car Seven Six Six Naught Three. You never advised us of shipping car here. No bills. Will advance seventy-five dollars and handle. Wire agent to deliver same at once."

On August 8 the plaintiff arrived in Topeka and sold the melons to other parties. He received \$146.82 for the melons. The expense incidental to their shipment and resale was \$156.52. Home-grown melons were then coming into Topeka, and the market was well supplied.

To support his contention that his demurrer to the plaintiff's evidence should have been sustained, the defendant argues that the telegrams between the parties did not constitute a contract; this argument is not good. The first telegram was a request for an offer to purchase melons. The next telegram was an offer to purchase, which was not accepted. The third telegram was an offer to sell a car of melons at a stipulated price. That offer was accepted by the fourth telegram. The third and fourth telegrams constituted a contract. (*Commission Co. v. Mowery*, 99 Kan. 389, 99 Kan. 399, 161 Pac. 634; 162 Pac. 313.)

The defendant insists that the plaintiff was negligent in getting the melons delivered to the defendant; and that as a result of that negligence, the melons were decayed and rotten when the bill of lading with draft attached arrived. Whether the delay in delivering the melons was sufficient to justify the defendant in refusing to comply with his contract, was a question of fact to be determined by the jury. That question was submitted to the jury under instructions of which no complaint is made, and which appear to have stated the law correctly.

The defendant argues that there was not a sufficient tender of the melons. When the draft was presented to him for payment, the melons were tendered to him.

The defendant further argues that on account of the delay in delivering the bill of lading, home-grown melons had become plentiful and cheap, and the melons sold to the defendant could not be marketed in Topeka. That was a question of fact to be determined by the jury.

The defendant also argues that when the car left Oklahoma it contained 30,340 pounds, but when it arrived in Topeka it contained only 24,000 pounds. The evidence was that when the car left Oklahoma it was billed as containing 30,340 pounds, and that when it was shipped out of Topeka, it was billed as containing 24,000 pounds.

The plaintiff's evidence was sufficient to compel the trial court to submit the cause to the jury for its determination, and the demurrer to that evidence was properly overruled.

2. Complaint is made of the following instruction:

"On the other hand if the plaintiff failed to ship to defendant melons of the kind and quality called for by the contract, and in the manner named or if through the fault of the plaintiff or those to whom he transferred the bill of lading, taken in his own name, the turning over of the melons by the carrier and the receipt of the same by defendant, was unreasonably delayed because of the nonarrival of the bill of lading within a reasonable time, then I say to you that the defendant was not bound to receive or pay for said melons, and your verdict should be in his favor."

The defendant's argument is that there was no evidence on which to base that instruction. An answer to that argument is that if there was no evidence on which to base the instruction, no defense to the action was proved. The instruction sub-

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mitted the defense to the jury. In substance, it stated that if the facts contended for by the defendant concerning the delay in delivering the shipment were true, the jury must find in his favor.

The judgment is affirmed.

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No. 21,133.

ELLA MURRELL, *Appellee*, v. MARY E. CRAWFORD, *Appellant*, et al.

SYLLABUS BY THE COURT.

1. **LANDLORD AND TENANT—Breach of Covenant to Repair—Measure of Damages.** "The general rule is that on a breach of the covenant by the landlord to make repairs the measure of damages is the difference between the rental value of the premises as they were and what it would have been if they had been put and kept in repair." (*Miller v. Sullivan*, 77 Kan. 252, syl. ¶ 1, 94 Pac. 266.)
2. **SAME—Personal Injuries.** The ordinary rule is that an award of damages for a landlord's breach of covenant to repair a dwelling house is not extended to include a liability for personal injuries sustained by the tenant in the use of the unrepaid property.
3. **SAME—Breach of Covenant to Repair—Damages Which Could Have Been Averted—Not Recoverable.** Where a landlord has agreed to repair the porch of a dwelling house and fails to do so, a tenant who knows of the defective condition of the porch and continues to use it for several months cannot recover special damages for a consequent injury when by a slight outlay she might have remedied the defect and averted the injury, and could have charged such outlay to the landlord against the rent then due and unpaid.
4. **SAME—Breach of Covenant to Repair—Injuries—Contributory Negligence.** Where a tenant knows that the porch of a dwelling house is defective and in need of repair but continues to use it for several months, and is injured thereby, she is guilty of such contributory negligence as will bar a recovery for such injuries, notwithstanding the landlord had promised to repair the porch but failed to do so.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed December 8, 1917. Reversed.

J. B. Larimer, and W. Glenn Hamilton, both of Topeka, for the appellants.

Tinkham Veale, of Topeka, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was an action for damages by a tenant against her landlord and the agents of the landlord for injuries sustained through the breaking of the floor of the front porch of a one-story dwelling house. The petition alleges that about April 1, 1915, the plaintiff and her daughter, at the request of the agent of the defendant, investigated the property for the purpose of renting it for a dwelling house, and thereafter called at the office of defendant's agents—

“And stated to W. C. Stephenson [agent] that the property above described was badly in need of repair, but that they would rent the same from the said defendants, [landlord and her agents] if the defendants would immediately put the property in good repair. . . . That the said W. C. Stephenson acting as agent for the defendant Mary E. Crawford, on or about the third day of April, 1915, leased the house to the said plaintiff and her daughter for a dwelling house from month to month, and at the same time he covenanted and agreed with the plaintiff and her daughter that they would immediately repair the property so that it would be in good, safe and tenantable condition, and requested and induced the said plaintiff and her daughter to move into the said house above referred to on his promise and representations that Mary E. Crawford, his principal, would immediately repair the said house and put it in good, safe and tenantable condition. That at this time the plaintiff and her daughter advised W. C. Stephenson, agent of Mary E. Crawford, that the porches on the said house were in a bad and dangerous condition; . . . that the plaintiff and her daughter relying upon the promise and representations of the said W. C. Stephenson, agent of the defendant, Mary E. Crawford, the owner of the said property, that they would immediately repair the said porches and put them in good, safe and tenantable condition, moved into the said dwelling house and began to use the same as a dwelling house. . . .

“The plaintiff further alleges that she and her daughter continued to occupy the said house as a dwelling house continuously up to about the 29th day of October, 1915. . . .

“The plaintiff further alleges that the defendants neglected, failed and refused to repair the said porches until after the plaintiff's injuries hereinafter complained of. That on or about the — day of September, 1915, while the plaintiff was still in the lawful possession of the said property as the tenant of the said defendants and in the peaceful enjoyment of the same, the plaintiff while walking on the front porch of the said dwelling house in a reasonable manner, fell through on account of its deteriorated, rotten and worn out condition, and thereby received dangerous and painful injuries. . . .

“The plaintiff further alleges that the said deteriorated, rotten and defective condition of the porch on the said house above referred to was

permitted to remain in such deteriorated, rotten and defective condition with the full knowledge and consent of the defendants herein over a long period of time and after repeated requests on the plaintiff's part to have the said property repaired and repeated promises on the defendants' part to repair the same."

Proper answers were filed and the cause was tried to a jury.

The plaintiff testified that after she had examined the house with a view to renting it she told the agent that the porch needed repairing.

"Q. What did Mr. Stephenson say, if anything, about repairs? Just state what he said about repairs, if anything. A. Why, when we went to pay him the first month's rent, I told him we would take the house if he would repair it. He said he would; move right in the next day and he would send a man right down to repair it. I told him the porches were leaning and looked like they were about in need of repair.

"Q. You mean the porch posts, A. Yes; kind of slides to the front. It seemed like it would settle down and need to repair it underneath. It looks fairly stout on top. . . . And it was kind of rotted—punk and cracks where it came together on the top.

"Q. You said Mr. Stephenson said— A. He said he would send a man down and repair the house right away—for me to move in.

"Q. Did you move in relying upon those promises? A. Yes, sir, the next day.

"Q. Did he repair the porch, to any extent, at all? A. No, sir.

"Q. Did he make any repairs on it? A. No, he did not repair it at all.

"Q. How long was it, after you moved in, before you had any of the boards there in the porch give away? A. Well, we moved the 3d of April and this was the 3d day of September that I fell through the porch.

"Q. You especially called his attention to the porches? A. Yes, sir.

"Q. How did you happen to do that? A. I seen it looked old and looked like it needed repairs.

"Q. Did you personally have any further conversation with Mr. Stephenson? A. Yes, I spoke to him once when he was down looking around the place. . . .

"Q. That was before the accident? A. Yes, sir.

"Q. How long before? A. It was about a month, I think, before."

The jury returned a verdict for plaintiff for \$330 and answered certain special questions, finding that defendant's agents had authority to make repairs, that before plaintiff moved into the house they promised to repair the porch, that the porch was in a dangerous condition on the day of the accident, and that the porch had not been repaired.

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Other special questions were answered:

"1. Did the plaintiff, prior to the renting of the house in question, notify Stephenson & Webb, or either of the firm, that the porches were in a defective, bad or dangerous condition? Answer: Yes.

"12. Was not the porch, on which plaintiff claims to have been injured, used by herself and the other occupants of the house, regularly from about the third day of April, 1915, until the third day of September, 1916? Answer: Yes.

"13. Did not the plaintiff know, or have as good opportunity to know, the conditions of the porch, prior to the time she claims she was injured, as did the defendants? Answer: Yes."

The principal errors assigned relate to the instructions given and refused. The trial court gave the following:

"6. . . . if you further find that at the time in question the defendant Stephenson agreed to repair the porch but failed to do so and that plaintiff while in the exercise of reasonable care for her own safety, suffered the injuries complained of by reason of such failure to have the porch repaired, then the defendant Mary E. Crawford would be liable for such injuries as the evidence shows that the plaintiff sustained. . . ."

Defendant contends that the instruction just quoted is not a correct statement of the law. Her counsel requested an instruction, refused by the court, which reads:

"10. You are instructed that, even though you do find from the evidence in this case that Stephenson & Webb had authority to, and did, agree to repair the premises in question, the plaintiff cannot recover for her injuries, if any, sustained by the defective conditions of the premises, unless such repairs were made, and the defendants were negligent in making such repairs."

It has frequently been decided that where a landlord attempts to make repairs on property, but only does so in an imperfect or ineffectual manner, and where the tenant relying upon such attempts to repair continues his tenancy and is injured thereby, an action for such injuries will lie in his behalf against the landlord. It has also been held that where the landlord knowingly conceals or keeps secret, dangerous defects which are likely to injure a tenant or a member of his household, and an injury results, the landlord's wrongdoing is tortious and he is liable in damages therefor. (*Moore v. Parker*, 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778 and note; *Miller v. Sullivan*, 77 Kan. 252, 94 Pac. 266; *Wells v. Hansen*,



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97 Kan. 305, 154 Pac. 1033: *Rull v. Rainey*, 99 Kan. 57, 160 Pac. 1016.)

On the other hand, it is settled law that a landlord is not liable in damages as for a tort for a tenant's injuries sustained through the landlord's total failure to make promised repairs.

In such case the landlord's liability is only for the breach of his covenant to repair, and this liability is measured by the difference in the rental value of the leased property unrepaired from its agreed rental value if the promised repairs had been made. If the repairs would cost but little, the tenant may make them himself and offset the expense against the rent. In this instance it cost about \$7 to make the repairs. The rent was \$10 per month and it was then two months past due and unpaid at the time of the accident. The landlord's failure to comply with his covenant to repair is likewise ground for rescission and termination of the tenancy. But personal injuries are almost uniformly considered by the courts to be too remote to be included in an action for breach of covenant to repair. Loss of life or limb is not a natural and probable consequence which ordinarily and reasonably could be anticipated from a breach of covenant to make repairs on a dwelling house. This is the doctrine of practically all the textbooks and it is supported by a plethora of decisions. (*Miller v. Sullivan*, 77 Kan. 252, 94 Pac. 266, 15 Ann. Cas. 561; *Anderson v. Robinson*, 182 Ala. 615, Ann. Cas. 1915D, 829; *Dustin v. Curtis*, 74 N. H. 266, 13 Ann. Cas. 169; *Davis v. Smith*, 26 R. I. 129, 3 Ann. Cas. 832; *Thompson v. Clemens*, 96 Md. 196, 60 L. R. A. 580; 18 A. & E. Encycl. of L. 234; 16 R. C. L. 1059; 3 Joyce on Damages, 1942; Jones on Landlord and Tenant, p. 675, § 592; 2 McAdam on Landlord and Tenant, 4th ed., p. 1316, § 386; 1 Tiffany, Landlord and Tenant, 574, 592, §§ 86, 87; 2 Underhill on Landlord and Tenant, 859.)

(See, also, Notes, 11 L. R. A., n. s., 504; 34 L. R. A., n. s., 798, 804; 48 L. R. A., n. s., 917.)

In *Hamilton et al., Executors, v. Feary*, 8 Ind. App. 615, affirmed in 140 Ind. 45, where a recovery for personal injuries sustained by a tenant was denied, the general rule touching a landlord's liability for breach of covenant to repair was discussed:

"In this respect the rule is not different from what it would be if the contract to repair had been between the tenant and a mechanic or work-

man employed by her to do the work. The only damages recoverable in such case would be the difference between the price agreed upon and the actual cost of the work if the employer had hired another to do it, and possibly such other damages as were sustained by reason of the delay." (p. 620.)

It seems therefore that the criticised instruction of the trial court was clearly erroneous, and some such instruction as the one requested or involving the principle discussed above should have been given. This conclusion will necessitate a reversal of the judgment; but it still remains to be determined whether a new trial may be awarded or whether judgment should be ordered.

The only notice of the defect in the porch which the landlord had was the information which the plaintiff tenant says she gave to the landlord's agents when she inspected the dwelling house with a view of renting it. She could impart no knowledge of the defective porch to the landlord except such knowledge as she herself possessed. Nevertheless, knowing the defective condition of the porch, and notwithstanding the landlord's continued failure to comply with her covenant to repair, the tenant occupied the premises and used the porch for several months.

"12. Was not the porch, on which plaintiff claims to have been injured, used by herself and the other occupants of the house, regularly from about the third day of April, 1915, until the third day of September, 1916? Answer: Yes.

"13. Did not the plaintiff know, or have as good opportunity to know, the condition of the porch, prior to the time she claims she was injured, as did the defendants? Answer: Yes." (Jury's special findings.)

In view of these findings, under the most elementary notions of justice, it must be held that the continued use of the porch for these five months, knowing of its defective condition, was such contributory negligence on the part of plaintiff as to bar any recovery whatever for her personal injuries. (*Atkinson v. Kirkpatrick*, 90 Kan. 515, 519, 135 Pac. 579; 16 R. C. L. 1057-1058.)

Plaintiff made some effort to avoid this logical consequence by some evidence tending to show that the upper sides of the porch boards were seemingly in such fair condition as might justify her in believing the floor was safe enough for use.

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That is inconsistent with plaintiff's pleading; and, moreover, the landlord could not be held liable for latent defects in the porch floor—her information on the subject being limited to what the plaintiff had given to defendant's agents. Thus plaintiff's case entirely fails.

It follows that the judgment of the district court must be reversed with instructions to set aside its judgment and to enter judgment for defendant, and it is so ordered.

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No. 21,185.

J. F. WALZ, *Appellant*, v. PETER KELLER et al., *Appellees*.

SYLLABUS BY THE COURT.

1. **HOMESTEAD** — *Lease and Contract Not Signed by Wife* — *Absolutely Void*. A homestead right attaches to land obtained under a contract of purchase where the purchaser and his wife occupy the land as a residence, and a new contract modifying the contract of purchase and stipulating for a surrender of possession in certain events, and also a contract of lease executed between the purchaser and the seller, none of which were signed by the wife and to which she gave no consent, are absolutely void.
2. **SAME**—*Defense to Action on Void Contracts*. Although the homestead may be sold for the payment of obligations contracted for its purchase, the purchaser and his wife are not precluded from defending the homestead right as against actions brought by the seller for rent and forcible detainer based on the void contracts above mentioned.

Appeal from Trego district court; JACOB C. RUPPENTHAL, judge. Opinion filed December 8, 1917. Affirmed.

*Ira E. Lloyd*, and *N. F. Nourse*, both of Ellsworth, for the appellant.

*A. D. Gilkeson*, of Hays City, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: J. F. Walz brought an action against Peter Keller to recover rent due upon a farm lease. Keller's wife and two mortgagees of the crop were also made defendants. Walz also secured a judgment in the justice of the peace court in a forcible detainer action for possession of the farm. The latter action being appealed to the district court, the two

actions were there consolidated and tried as one. Plaintiff appeals from the judgment in defendant's favor.

In 1908, defendant had entered into a contract with Mary L. Burpee by the terms of which she agreed to sell the land in question, situated in Trego county, to him for \$2,700. He occupied it until January 24, 1911, when he was in default to the extent of about \$900, having paid \$700 on the purchase price. He and his brothers then entered into a contract with plaintiff by which the latter was to sell them certain land in Gove county for \$30,000 and, as part of the consideration therefor, defendant (his wife joining with him) assigned to plaintiff his interest in the Burpee contract.

On April 1, 1914, defendant and his brothers being in default about \$4,500 on the Gove county land, plaintiff and defendant then adjusted matters between them by releasing each other from all liability on the Gove county contract, and entering into another contract in which defendant agreed to purchase the Trego county land from the plaintiff for \$2,265, payable in seven annual installments of \$325 each, commencing October 1, 1914, with interest at six per cent. Strict compliance with its terms as to the times of making payments was made a condition of the agreement. The defendant and his wife and children have occupied the land as a homestead since May, 1914. On October 1, 1914, defendant failed to make the payment then due and notice to quit the premises was served upon him by plaintiff. Defendant asked for further time, and on October 2, 1914, they entered into another written agreement under which the contract of purchase made April 1, 1914, was surrendered to plaintiff, and it was provided that it might be redeemed on the following conditions:

"If the second party shall on October 1st, 1914, or on October 1st, 1915, make payment in full to the said party of the first part of all principal payments due at the time of such payment on contract for sale above mentioned, dated April 1st, 1914, then the said first party agrees to renew the said contract of sale or execute a new one under like terms and conditions."

It was further provided that the defendant should pay, not later than October 30, 1914, the sum of \$67.95 as interest due under the contract of purchase, and that a failure to make such payment in time should render the new contract null and void.

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At the time this agreement was made the lease on the land was executed. The interest payment of \$67.95 was not made by defendant, and on November 3, 1914, plaintiff sent defendant a letter chiding him for failing to pay the interest and declaring that he considered the contract of October 2, as well as the contract of purchase mentioned therein, to be void. The action for rent was commenced August 13, 1915, and the forcible detainer action was begun on September 7, 1915. No payments were made by defendant on the contracts nor were any taxes paid except the last half of those of 1913; but on September 27, 1915, he tendered to plaintiff \$876.42 as the amount due October 1, 1915, on the contract of purchase, together with taxes paid by plaintiff. The defendants in their answers admitted the execution of the lease and the nonpayment of rent, but relied on the contract of purchase, stating that the land was acquired for a homestead, and that the defendant's wife had never consented to the surrender of the contract nor to the execution of the lease, nor conveyed away her interest in the land.

The court ruled that when Peter Keller and his family took possession of the land under the contract of April 1, 1914, it became a homestead, and that as his wife was not a party to the subsequent negotiations and had never consented to any modification of the original contract or to a surrender of her homestead rights, the lease was a nullity and the original contract was still in force. The notices were held to be insufficient, one because it was premature and the other because of indefiniteness. The court further held that the second contract was a recognition that the first was still in force and that, by the second, plaintiff had waived the provisions of the first as to the times of payment of principal and interest, and also that it operated to extend the times for some of the payments.

It is contended by plaintiff that there is inconsistency in the ruling that the contract of October 2 is valid enough to extend the times of payment of principal and interest provided for in the first contract, but invalid as to the cancellation of the first contract and as to that provision of the second which makes nonpayment of interest at the new times fixed a ground of forfeiture. The second contract is wholly void as against the homestead interest, as is also the contract

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of lease. A homestead right attaches to an equitable interest as well as to a fee-simple title. It has been held that a leasehold interest, whether it be for ninety-nine years or for one year, will support a homestead claim. (*Hogan v. Manners*, 23 Kan. 551.) In *Moore v. Reeves*, 15 Kan. 150, it was held that a contract of purchase such as the one in question was sufficient to uphold the homestead right, and that when the land is actually occupied by the family the husband cannot transfer his interest even conditionally without the consent of his wife. In another case, where a son acquired an equitable interest in land owned by his father through the care and support of the father, and with his wife and children occupied it as a homestead, the son was induced to sign a lease under which he was to use the land until a fixed time, when he was to give it up and yield possession of the same to the father. The court held that the lease was void as a transfer or release of the interest of the son for the reason that the homestead right had attached and that the wife had not signed the lease nor given her consent to its execution. (*Holland v. Holland*, 89 Kan. 730, 132 Pac. 989.) For the same reason the contract of surrender as well as the lease executed by Keller on October 2 must be held to be void. The homestead right was in no way affected by the negotiations and agreements between the purchaser and seller to which the purchaser's wife gave no consent. The trial court rightly found that the first contract still subsists and that the defendants were not released from its obligations and liabilities.

By that contract the rights of the parties must be measured, and the homestead right is, of course, held subject to its terms and conditions. Although the property is a homestead, the purchaser and his wife cannot keep the land and also the money which he agreed to pay for it, if the seller chooses to enforce the obligations executed under the contract of purchase. The statute provides that ". . . no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon," etc. (Gen. Stat. 1915, § 4697.) Plaintiff contends that the homestead right cannot be set up as against the seller in this proceeding since the purchaser is in default for the purchase money. The exemption may be

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claimed in any proceeding except from a sale for taxes, for obligations for purchase money, or for the erection of improvements. The actions brought by plaintiff, as we have seen, were not for the recovery of purchase money nor to obtain a judgment for the sale of the premises, but they were based on agreements that are absolutely void.

The defendants had a right to assert the claim of a homestead interest, and the judgment upholding that claim is affirmed.

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No. 21,141.

**HALIA F. ALLEN, Appellee, v. THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Appellant.**

SYLLABUS BY THE COURT.

1. **FRATERNAL INSURANCE—Suspension—Reinstatement—Acceptance of Back Dues—Evidence of Custom.** In an action upon a fraternal benefit certificate where the defense was that the assured had been suspended for nonpayment of dues and had not been legally reinstated at the time of her death, it is held, it was not error to admit evidence of a custom of the local officers of the defendant to accept dues and assessments from members who were delinquent and to reinstate them.
2. **SAME—Financier of Local Lodge—Agent of Insurer—Void By-law.** Instructions are approved which charged that the acts of the officers of the local lodge, although unauthorized in the first instance, if ratified with the knowledge of the superior officers having authority, amount to a waiver of any right or forfeiture then existing in favor of the society and against the member; that notice given to the officers of the local lodge is notice to the national council; that in receiving payments of dues and assessments the local financier was, in fact and in law, an agent of the defendant and not of the member, and that a by-law making the financier of the subordinate lodge the agent of the members, is void.
3. **SAME—Payment of Back Dues—Warranty of Good Health—Instruction.** By reason of a special finding that at the time she was reinstated the member was not in bad health, it is held, that an instruction respecting the provision of the by-laws that payment of back dues and assessments constitute a warranty that the member's health is good, could not have prejudiced the defendant and became immaterial.
4. **SAME—Effect of Acceptance and Retention of Dues after Suspension.** After accepting from the beneficiary the dues and assessments for the months of December and January, and retaining them until after the death of the assured, it was too late for the defendant to question the authority of the beneficiary to make the payments.

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5. *SAME—Verdict—Judgment—Interest.* Where the jury return a verdict in plaintiff's favor for the amount of a benefit certificate with interest at six per cent, and the court without having the verdict corrected, renders judgment for the amount with six per cent from the date of the assured's death, *held*, there was no error or irregularity of which the defendant can complain.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed December 8, 1917. Affirmed.

*S. C. Westcott*, of Galena, and *James P. Mead*, of Joplin, Mo., for the appellant.

*E. B. Morgan*, of Galena, and *Don H. Elleman*, of Columbus, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The defendant appeals from a judgment against it in an action upon a fraternal benefit certificate issued to Ida W. Estep, who became a member of the order on August 5, 1912. She died on March 11, 1916. The plaintiff is her sister, who was named as beneficiary. In addition to a general denial, the answer alleged that on January 1, 1916, Mrs. Estep was suspended for nonpayment of dues for the previous month of December, and that she remained suspended until January 31, 1916, when there was an attempt by her sister, the plaintiff, to reinstate her by paying the delinquent dues and assessments. The answer pleaded specially certain laws of the order which provide for the reinstatement of a suspended member on the express condition that the member is in good health at the time payments are made with the view of reinstatement, and declaring that the payment of dues and assessments for reinstatement shall be a warranty by the member that he is in good health at the time of payment; also a provision that the national council shall not be bound by the acceptance of arrears of assessments and dues from suspended members who are not entitled to reinstatement in accordance with the laws of the order, and that "the retention by the financier," or by the defendant society "of assessments and dues paid by members or for them, with a view to reinstatement other than as provided in the laws of the order either before or after death, shall not



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constitute a waiver of any provisions of these laws." The answer also pleaded a law of the order to the effect that no officer of the society, national or local, is authorized to waive any provisions of the defendant's by-laws relating to the contract between the member and the society, and a further provision that a subordinate council and its officers are the agents of its members in the reinstatement of members, and the collection and transmission of all assessments to the national council.

With their general verdict the jury returned answers to special questions submitted by the plaintiff as follows:

"Q. Was the plaintiff in good health at the time of her reinstatement on January 31, 1916? A. No.

"Q. If you answer question No. 1 'No' state what disease, ailment or sickness she was afflicted with? A. Cold and la grippe after effects of child birth.

"Q. Was the December, 1915, assessment paid to the financier of Galena Council No. 61, on or about January 31, 1916? A. Yes.

"Q. At the time this assessment was paid did said financier know or has she been told of the fact that Mrs. Estep was in bad health? A. Yes.

"Q. Did said financier make any inquiry about the health of Mrs. Estep at the time of receiving said payment on January 31, 1916? A. Yes.

"Q. Did said financier in February, 1916, remit to the National Council the money paid on behalf of Mrs. Estep with a report showing the payment of said assessments and the reinstatement of Mrs. Estep? A. Yes.

"Q. Did said National Council retain the amount so paid without requiring or requesting any proof of her condition of health, until after her death? A. Yes.

"Q. Had the financier of Galena Council No. 61 adopted any custom or course of conduct in reference to accepting payments which were overdue and reinstating the members without any inquiry as to their condition of health? And if so what was said custom or course of conduct? Answer fully. A. Yes. Simply by accepting back dues.

"Q. Did Ida W. Estep contract the ailment or disease from which she died before or after January 31, 1916? A. After.

"Q. Would Ida W. Estep have died from the ailment she had prior to January 31, 1916, had it not been for the birth of her baby on January 20th, and later taking cold and getting her feet wet? A. Don't know."

Among the answers to questions submitted by the defendant are the following:

"Q. Was not the said Ida W. Estep first visited by Dr. Sharp of Neodesha, Kansas, on the 19th day of January, 1916? A. Yes.

"Q. Was not the said Ida W. Estep suffering with some lung ailment when the doctor visited her first? A. No.

"Q. Was Ida W. Estep in good health on the 19th day of January, 1916? A. Yes, with the exception of pregnancy.

"Q. Did not the said Ida W. Estep continue to be in bad health from the 19th day of January, 1916, to the time of her death? A. Yes.

"Q. Was not her health bad, regardless of her pregnancy? A. No."

A witness for plaintiff was permitted to testify that on January 31, 1916, when she paid the dues and assessments on Mrs. Estep's policy for the month of December, she stated to the local financier that Mrs. Estep was not feeling well. There was certainly no error in receiving the testimony for what it was worth; whether it was sufficient upon which to support the finding of the jury to the effect that the financier was informed that Mrs. Estep was in bad health is another matter. The main contention of the defendant, raised by a demurrer to the evidence, objections to instructions given and refused, objections to certain special questions, a motion to set aside answers to certain questions, and the motion for a new trial, may be summarized as follows: It is claimed the testimony shows, and the jury found, that Ida W. Estep was in bad health from and after the 19th of January, 1916, and that this being so, the provisions of the constitution and laws of the order set out in the answer established a complete defense to the action. In the first place, the testimony did not show, and the jury, as we construe their answers to the special questions, have not found that Mrs. Estep was in bad health from and after the 19th day of January, 1916. There are some slight inconsistencies in the language used by the jury in the answers to the numerous questions submitted; but construing all of the answers together, it is manifest to our minds that the jury believed from the evidence that on the 31st day of January, 1916, when she was reinstated, Mrs. Estep was not in bad health, except as the jury seem to have regarded pregnancy as constituting, at least, not good health. They find she contracted the ailment or disease from which she died after January 31, 1916, so that it is not very important whether her health was good or bad on the 19th of January, if her condition at the time she was reinstated, on January 31, had nothing to do with her death. In answer to an interrogatory submitted by the de-

fendant the jury say that Mrs. Estep's health was not bad except on account of her pregnancy.

In the second place, the provisions of the constitution and laws of the order pleaded in the answer did not establish a complete defense to the action, because, as has been often decided, many of the provisions relied upon by the defendant may be waived, and some of them are void, and others will not be given the construction contended for by the defendant. These matters will presently be referred to in connection with the contention respecting error in the instructions.

It was not error to admit evidence of a custom of the local officers of the defendant to accept dues and assessments from members who are delinquent and to reinstate them. (*Foresters v. Hollis*, 70 Kan. 71, 78 Pac. 160, and authorities cited in the opinion; *Benefit Association v. Wood*, 78 Kan. 812, 817, 98 Pac. 219.) Besides, the constitution and by-laws of the defendant expressly recognize this practice and custom, and attempt to avoid the effect of the acceptance through the local financier of past dues and assessments, by declaring that the retention of these dues by the head financier or by the order shall not constitute a waiver of any provision of the laws; that no officer of the society nor any local officer or member may bind the company by waiving any provisions of the by-laws which relate to the contract between the member and the society, and by further declaring that the subordinate council and its officers are the agents of its members in the reinstatement of members, and in the collection and transmission of all assessments to the national council.

The court very properly instructed the jury that the acts of the officers of the local lodge, although unauthorized in the first instance, if ratified with the knowledge of the superior officers having authority, amount to a waiver of any right or forfeiture then existing in favor of the society and against the member; that notice given to the officers of the local lodge is imputed to the national council; that the by-laws making the financier of the subordinate lodge the agent of the members is void; and that such financier is the agent of the defendant society in receiving dues and assessments. These instructions state the law as declared in former decisions. In receiving payments of dues and assessments the local financier was,

in fact and in law, the agent of the defendant, and not of the member. (*Pyramids v. Drake*, 66 Kan. 538, 72 Pac. 239; *Fraternal Aid Association v. Powers*, 67 Kan. 420, 73 Pac. 65; *Benefit Association v. Wood*, supra; *Mayes v. Knights & Ladies of Security*, 92 Kan. 841, 846, 142 Pac. 290.) With respect to the provision of the by-laws that the payment of back dues and assessments constitute a warranty on the part of the member that his health is good at the time, the court charged that before the jury could find from the evidence that there was a breach of this warranty, by reason of the bad health of the member, the nature or degree of such bad health must be material; that while there must be no evasion or fraud or suppression of material facts, and must be absolute good faith, yet where the evidence shows there has been no evasion or fraud nor purpose to conceal any fact which the member would naturally under the circumstances suppose was required to be stated by her, or on her behalf, and where the society has not been prejudiced or injured in any manner, such defense cannot be maintained. Most of the language of this instruction is a paraphrase of language used in the opinion in the recent case of *Farragher v. Knights & Ladies*, 98 Kan. 601, 605, 159 Pac. 3. Whether the instruction was proper in this case, it cannot be said that it prejudiced the defendant, because of the special finding that at the time she was reinstated the member was not in bad health.

The provision that no officer of a local lodge may waive any provision of the by-laws has no application to waiver by operation of law resulting from subsequent acts of the local officer. (*Modern Woodmen v. Breckenridge*, 75 Kan. 373, 379, 89 Pac. 661.) Respecting the attitude of the courts in discouraging forfeitures based upon laws and regulations of semibenevolent associations, see case last cited.

After accepting from the beneficiary the dues and assessments for the months of December and January on Mrs. Estep's certificate, and retaining them until after her death, it was too late for defendant to question the authority of the beneficiary to make the payments, if indeed it could at any time. There was very little conflict in the testimony as to the facts, the material findings appear to be sustained by evidence, and the legal propositions relied upon by the defendant, while not wholly

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unsupported by authority elsewhere, are no longer open questions in this state.

Finally, it is insisted there was error in the manner in which the judgment was rendered. The verdict assessed the amount due the plaintiff at \$953, with interest at 6 per cent. The petition had asked for this sum with interest at 6 per cent from March 11, 1916. The court rendered judgment for \$953, with 6 per cent from May 11, 1916, to the date of the judgment, making a total of \$974.94. The defendant objected to the allowance of interest. The court might have directed the jury to correct their verdict by computing the interest and adding it to the amount found due, or the court might have computed the interest and prepared another form of verdict with the proper amount and directed the foreman of the jury to sign it. It cannot be doubted that plaintiff was entitled to interest on the amount of the certificate from the date of the death of the assured. The irregularity in the manner of rendering the judgment did not affect the substantial rights of the defendant.

The judgment is affirmed.

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No. 21,146.

CECIL Y. SHINN, *Appellee*, v. NATIONAL TRAVELERS BENEFIT ASSOCIATION, *Appellant*.

SYLLABUS BY THE COURT.

**BENEFIT INSURANCE—*Application—Answers Omitted by Agent—Policy Valid.*** When an insurance agent propounds to a customer the categorical list of questions provided by the company, and leaves out such answers given by him as would work a refusal of the application, and the company takes his money and issues his policy, it, and not the applicant, is held responsible for the situation thus arising. Such company cannot defeat an action on the policy because of any stipulations or admissions contained in such application, which the insured at the instance of the agent signed without reading and without knowledge of its contents.

Appeal from Cloud district court; JOHN C. HOGIN, judge. Opinion filed December 8, 1917. Affirmed.

*Isaac L. Rigby*, of Wichita, *Donald Evans*, *George H. Carr*, and *Fred P. Carr*, all of Des Moines, Ia., for the appellant.

*Park B. Pulsifer*, *Charles L. Hunt*, and *Clyde L. Short*, all of Concordia, for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff recovered a judgment on an accident policy and the defendant appeals. The application began as follows:

"I hereby make application for membership in the Association, basing my application upon the following representation of facts, all of which I hereby certify to be true, complete and material to the risk. I agree that any statement made by me to the agent or solicitor of this application shall not bind the Association unless written hereon."

The defendant contends that the parties, by agreement, stipulated that the statements quoted were material to the risk and in the nature of warranties, and that the statements in the application, that the plaintiff had had no surgical advice regarding illness or injury during the preceding five years, except once, and that he had never received or been refused compensation for accidental injury on a policy for insurance except on one occasion, were in fact untrue and known so to be by the plaintiff but not known to the defendant when the policy was issued, and that as the latter contained the provision that it should be void if there had been any fraud or misrepresentation by the member concerning the insurance the company is not liable. The plaintiff was permitted to, and did, testify, in substance, that the application was written at a hotel and shoved across the table to him by the agent and signed without reading and without knowledge of its contents and without knowledge that the agent had not written in the answers given by the plaintiff. Further, that he told the agent that he had received a certain sum from an association of Columbus in 1914, another from a commercial men's association in 1915, and also in 1911 or 1912, on account of being struck by the falling of a tent pole in a wind storm, and by falling in an attempt to board a train.

In other words, it is the old story, according to the plaintiff, of the applicant making full and complete answers and of the agent leaving out everything likely to result in a refusal, the

applicant assuming and supposing that his answers had been written down as he gave them. Authorities are cited in the brief and were referred to in the able oral argument of counsel in support of his position, that because of the provisions in the application first quoted the question of immateriality is foreclosed and the plaintiff cannot be heard to assert that any of the answers contained in the application as written are immaterial; and in support also of the position that the plaintiff is bound by the agreement in the application that any statement made by him to the agent could not bind the association unless written thereon, and that the further agreement that the statements and representations contained therein could not be altered or changed by any agent of the company.

This court by a long line of decisions is on record to the effect that when an insurance agent seeking business and finding a prospect puts him through the categorical examination provided by the company, and leaves out such answers given by him as would work a refusal of his application, and the company takes his money and issues his policy, it, and not the applicant, is held responsible for the situation thus arising. When, as testified to in this case, the customer makes truthful answers, and the paper supposedly containing them is shoved across the table to him for signature, and he immediately signs without reading, it does not lie in the mouth of the company to criticise him for trusting the honesty of its agent to write the answers as given. And if it is revealed that the application contained warranties and admissions of the agent's lack of authority, this cannot avail the company whose agent has not called the customer's attention thereto, but who has received his signed application knowing that he has no knowledge of what it contained.

This rule, so manifestly in accord with common sense and fair dealing, has abundant support in the decisions of other courts, and still meets with the approval of this court.

The following authorities are cited without quotation, as abundantly supporting what has been said: *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291; *Insurance Co. v. Gray*, 44 Kan. 731, 25 Pac. 197; *Despain v. Insurance Co.*, 81 Kan. 722, 106 Pac. 1027; *Pfiester v. Insurance Co.*, 85 Kan. 97, 116 Pac. 245; *Broadly v. Fire Association*, 94 Kan. 245, 146 Pac.

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343; 14 R. C. L., p. 1159, § 340; *Deming Investment Co. v. Shawnee F. Ins. Co.*, 160 Okla. 1, and Note, 4 L. R. A., n. s., 607; *Suravitz, Appellant, v. Prudential Ins. Co.*, 244 Pa. St. 582, and Note, L. R. A. 1915A, 273.

The assignments of error all involve the operation of the rule thus announced.

The learned trial court in its rulings and instructions followed this rule and the judgment is affirmed.

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No. 21,151.

G. H. MILES et al., *Plaintiffs*, v. E. C. UNDENSTOCK et al., as THE BOARD OF EDUCATION OF OSAGE CITY, *Defendants*.

SYLLABUS BY THE COURT.

MANDAMUS—*To Compel Employment of Additional Teacher—Writ Denied.* A writ of mandamus will not issue to compel the board of education of a city of the second class to employ an additional teacher in any particular school in the city.

Original proceeding in mandamus. Opinion filed December 8, 1917. Writ denied.

*W. I. Jamison*, and *W. Herbert Jamison*, both of Topeka, for the plaintiffs.

*George P. Hayden*, and *R. F. Hayden*, both of Topeka, for the defendants.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiffs seek to compel the defendants, as the board of education of Osage City, a city of the second class, to employ an additional teacher in one of the schools of that city.

The alternative writ of mandamus alleges that the plaintiffs are residents, citizens and taxpayers of Osage City; that at the corner of 14th and E streets there is located a school building known as the 14th street school; that there has been continuously, for a number of years, at least two teachers employed in that school; that in 1916 the school board, the defendants, reduced the number of teachers employed in the school to one, and reduced the number of grades taught in



the school by excluding the sixth grade, so that there are now taught in the school only the first, second, third, fourth and fifth grades; that the petitioners are residents of the school district in which the 14th street school is located, and are the parents of children of school age eligible for attendance in that school; and that their children, who have advanced beyond the fifth grade, must go to another school two miles from their homes, and must walk across the tracks of two railroads on which trains are being run and switching is being carried on almost continuously; and that for one mile of the distance the children must travel where there are no sidewalks or paths.

The defendants have filed a motion to quash the alternative writ of mandamus, and the cause is submitted on the writ and motion.

The act which the plaintiffs seek to control is one that calls for the judgment of the board of education. That board must determine what shall be done. The courts cannot control the board in the exercise of that judgment. In *Williams v. Parsons*, 79 Kan. 202, 99 Pac. 216, this court said:

"That boards of education, and not the court, must locate schools, untrammelled by judicial interference in the exercise of the discretion wisely committed to them by the law, is a principle to which we give full and hearty approval; but the situation here, according to the recitals of this writ, is so beset with impending dangers that we cannot say that the attendance of these children at this school should be compelled." (p. 207.)

In a subsequent opinion in the same case, *Williams v. Parsons*, 81 Kan. 593, 106 Pac. 36, the court said:

"The alternative writ was sustained because it alleged that the railroad tracks which these children were required to cross were so numerous and were in such constant use that the route between the plaintiff's home and the school was unreasonably dangerous. The commissioner finds the fact to be otherwise; that while some tracks have to be crossed they are fewer in number than stated, and are used less frequently; and that the crossings are reasonably safe. The control of city schools, including the selection of sites and the distribution of pupils, is devolved by the legislature upon the board of education. The discretion committed to that body is to be exercised, as was said in the opinion denying the motion to quash, 'untrammelled by judicial interference.' (79 Kan. 202, 207.) Its judgment, and not that of the courts, must determine the proper solution of the practical questions of administration that continually arise. Its decisions must be final except when its action is capricious or arbitrary, and

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under the findings that condition does not exist here. A peremptory writ is therefore denied." (p. 594.)

The writ in the present action does not allege, and it probably cannot be proved, that the lives of pupils are imperiled by crossing the railroad tracks.

The motion to quash the alternative writ is allowed, and the peremptory writ is denied.

No. 21,156.

JAMES M. WALMSLEY, *Appellee*, v. THE RURAL TELEPHONE  
ASSOCIATION OF DELPHOS, *Appellant*.

SYLLABUS BY THE COURT.

1. **NEGLIGENCE—Telephone Wires Crossing Highway—Sufficiency of Evidence.** Negligence in the maintenance of a telephone wire across a public highway is sufficiently established when it is shown that the wire hung so low as to interfere with a customary use of the highway.
2. **SAME—Injuries—Proximate Cause—Question for Jury.**  
"Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result." (*Railway Co. v. Parry*, 67 Kan. 515, syl. ¶ 2, 73 Pac. 105.)
3. **SAME—Telephone Wire Over Highway—Injuries—Prima Facie Case—Shifting of Burden of Proof.** When a plaintiff has proved that he sustained injuries through the dangerous situation of a telephone wire hanging across a public highway, the burden passes to the defendant to show that the dangerous situation of the wire was not due to the act of the defendant and had not existed for such length of time as to charge the defendant telephone company with notice of its defective condition.
4. **SAME—Trial—Record Examined—No Prejudicial Error.** The pleadings, the evidence, the instructions given and refused, and the judgment, in an action to recover damages for personal injuries sustained through the negligent maintenance of a telephone wire across a public highway, examined, and no prejudicial error discerned therein.

Appeal from Ottawa district court; DALLAS GROVER, judge.  
Opinion filed December 8, 1917. Affirmed.

*Thomas L. Bond*, of Salina, for the appellant.

*E. C. Sweet*, of Minneapolis, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This is an appeal from a judgment awarding damages to plaintiff for injuries sustained through the alleged negligence of defendant in the maintenance of its telephone wire across a public road.

The plaintiff was riding on a low iron-truck wagon and hayrack with a large steel grain bin loaded thereon. He carried a loaded rifle and was standing on the right front end of the hayrack. Plaintiff's servant was driving the team of horses at a walking pace. The telephone wire across the highway hung so low that it caught the grain bin and caused the wagon to upset, and the plaintiff was thrown to the ground. The bin struck the rifle and it was discharged; the bullet entered plaintiff's chest, and he was severely wounded.

Defendant's answer was a general denial and contained an allegation that the telephone wire was properly maintained so as not to incommode the public in the ordinary and reasonable use of the highway. Defendant's answer also contained a plea of contributory negligence.

The jury's general verdict was for \$3,000, and a remittitur of \$1,000 was conceded by plaintiff. Two special questions submitted by the court were answered:

"1. Q. At the time of the injury complained of was the plaintiff exercising ordinary care for his own safety? A. Yes.

"2. Q. At the time of the injury complained of did the telephone wire interfere with the use of the highway for ordinary purposes of travel? A. Yes."

The plaintiff's evidence tended to prove all the allegations of his petition. The facts were simple. The level of the hayrack was about three feet above the ground. The height of the bin was about eight feet at the eaves where the telephone wire caught the bin. Therefore the wire hung down or sagged to about eleven feet from the ground. It was shown that the hauling of threshing machines and loads of hay is a common use of public roads, and such machines and loads with their drivers riding thereon reach to a height of eleven feet or more. It was also shown that the hauling of steel grain bins on the highway is common. The stringing of telephone wires across highways at the low height of eleven feet is *prima facie* negligence. (37 Cyc. 1645, 1646.)

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It is contended by defendant that there was a total failure of proof that the telephone company knew that its wire was hanging so low as to endanger the use of the highway, and a total failure of proof that it so hung for such a length of time that the company should have known of its negligent condition. The proof did fail in that respect. Will that exempt the defendant from liability? If so, it will seldom avail one injured on a public highway through the negligent hanging of wires to seek a recovery for damages, for unless the injured person was acquainted in the neighborhood it would be impossible for him to find witnesses to show that the negligent or dangerous hanging of the wires had existed for some length of time. If his mishap occurred on a lonely and unfrequented highway there would be no witnesses to prove the condition or negligent height of the wires prior to his accident. On the other hand, it is always the duty of a telephone company to maintain its wires at a safe height, and it is the duty of the company to make repairs promptly if through wear and tear, or storm, or vandalism, the wires come down to a dangerous level. In other words, a telephone company must look after its property. If this company did look after its property at reasonable intervals, it knew when its wires were last seen in a safe situation, and could have readily shown the facts. Then, of course, if it had proved that shortly before the plaintiff's accident the wires were hanging safely and properly, it would not ordinarily be liable for an injury growing out of a sudden disrepair of its wires which it did not know of, and could not reasonably have known of in time to repair before the plaintiff was injured. The court holds, therefore, that when the plaintiff proved the negligent condition of the wire, and that it caused his injury, his *prima facie* case was established, and the burden of proof then passed to the defendant to show that the negligent condition had not existed a sufficient length of time for the company to learn of its defective condition, or to charge it with notice thereof. This imposed no unreasonable burden on defendant. It is simply an incident among the many responsibilities attaching to those privileged persons and corporations who obtain and enjoy special rights of occupancy in the public highway.

That the plaintiff establishes his *prima facie* case when he shows the dangerous situation and condition of defendant's

property which caused his injuries is supported by the philosophy and reasoning of the following analogous cases: *O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674; *Chenall v. Palmer Brick Co.*, 117 Ga. 106; *Armour v. Golkowska*, 202 Ill. 144; *American Exp. Co. v. Terry*, 126 Md. 254; *Thomas v. Western Union Telegraph Company*, 100 Mass. 156; 37 Cyc. 1644, 1645. (See, also, *Weaver v. Dawson County Mutual Telephone Co.*, 82 Neb. 696.)

That the burden then shifts to the defendant to show that the dangerous situation had not existed so long as to charge the defendant with notice of it is supported by the reasoning of the following cases: *The Joseph B. Thomas*, 81 Fed. 578; *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528; *Jacks v. Reeves*, 78 Ark. 426; *Ligon's Admr. v. Evansville R. Co.*, 165 Ky. 202; *Talge Mahogany Co. v. Hockett*, 55 Ind. App. 303; *Gibler v. Railroad*, 148 Mo. App. 475; *May v. Railroad Co.*, 75 W. Va. 797; 37 Cyc. 1644, 1645.

A curious contention was made in the oral argument, and slightly mentioned in the brief, that the plaintiff could not recover because he did not have a hunter's license at the time he was injured. Plaintiff admitted that he had no license, and that shortly before the accident he had jumped off the wagon to get a shot at a rabbit, and that he planned to shoot some wolves in a field towards which he was going. There is no merit in this contention. The want of a hunter's license and the breach of the hunter's license law did not contribute in the slightest degree to plaintiff's injuries. (*Clark v. Powder Co.*, 94 Kan. 268, 279, 146 Pac. 320; *Oplotnik v. Mining Co.*, 95 Kan. 545, 547, 148 Pac. 616.)

Touching the carrying of the rifle, the court sufficiently instructed the jury:

"9. It is the claim of the defendant that plaintiff was negligent in the manner in which he was using and holding his rifle at the time of the accident and that such negligence contributed to his injury; and the jury are instructed that if you find from the evidence that the plaintiff was negligent as claimed by the defendant and that such negligence contributed to his injury, then your verdict should be for the defendant."

The plaintiff's evidence was that he was carrying the rifle at "half notch" or "safety," and that the steel bin struck the rifle, causing it to be discharged. The jury's first special find-

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Walmsley v. Telephone Association.

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ing is a determination that plaintiff was not guilty of contributory negligence in his manner of carrying the rifle.

A number of criticisms are made touching the instructions given and refused, but little can be discovered therein which would warrant discussion. Some fault is found with the court's definition of negligence, but it was sufficiently clear and simple to serve the purpose of this action, and no error can be traced to it. Certain instructions asked were sufficiently covered by those given, and no prejudicial error can be noted in the refusal of the others requested.

Another question in this case concerned the proximate causal connection between defendant's negligence and the consequences of that negligence. ✓ The defendant was negligent in the maintenance of its telephone wire. Was that negligence the proximate cause of the plaintiff being shot? That some mishap was likely to occur to people riding and driving with customary loads on the highway, through the negligent manner of stringing the wire could have been anticipated. Damage of some sort was natural and probable, almost inevitable. That somebody would be shot through defendant's negligence would not have been anticipated. But the law does not say that if the particular injury arising from the negligence cannot be anticipated a recovery cannot be had. That some damage, some injury, would probably arise from the existing negligence and that it could reasonably have been expected is all that the law requires to justify a recovery. (*Railway Co. v. Parry*, 67 Kan. 515, syl. ¶ 2, 73 Pac. 105; *Hill v. Railway Co.*, 81 Kan. 379, 382, 105 Pac. 447; *Hartman v. Railway Co.*, 94 Kan. 184, 189, 146 Pac. 335.)

The judgment is affirmed.

No. 21,158.

THE HAMILTON-COLLINSON HARDWARE COMPANY, *Appellant*, v.  
THE ARKANSAS CITY OIL & GAS COMPANY et al. (DAN W.  
BROWN, Receiver, etc., *Appellant*), G. W. MOUNTS, Inter-  
pleader, *Appellee*.

## SYLLABUS BY THE COURT.

1. OIL AND GAS COMPANY—*Lease—Forfeiture—Garnishment of Assets—Rights of Creditors*. An oil and gas company obtained leases, purchased a rig, tools and appliances, and began the drilling of a well on the land of a lessor. In the lease was a clause that upon a failure of the lessee to drill or complete a well in a certain time or make certain payments the lessor could declare a forfeiture after ten days' notice. Before the well was completed the lessee became insolvent, allowed its leases to lapse, left its rig, tools and appliances on the farm of the lessor, and abandoned the enterprise. Persons who performed labor for the company obtained judgments against it and procured the service of a garnishee summons upon the lessor on whose land the rig, tools and appliances of the company were left. In a controversy between creditors it is held, that although the lessor had not declared a forfeiture of the lease, he is to be regarded as in possession and control of the property left on his farm, for the purpose of garnishment, and that he was a proper garnishee in the actions brought by the laborers.
2. SAME — *Lease — Abandonment — Notice of Forfeiture Unnecessary*. Since the lease had been allowed to lapse and the lessee had abandoned the enterprise and is not claiming any right under the lease, a formal forfeiture by the lessor after giving notice was not necessary to his liability as a garnishee in the actions brought by creditors of the company.

Appeal from Cowley district court; OLIVER P. FULLER, judge.  
Opinion filed December 8, 1917. Affirmed.

C. T. Atkinson, of Arkansas City, for the appellant.

Albert Faulconer, and C. Ward Wright, both of Arkansas City, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: The principal question involved in this appeal is the validity of garnishment proceedings.

The Arkansas City Oil & Gas Company was organized in the early part of 1914, and leases were secured by it on about

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Hardware Co. v. Oil & Gas Co.

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two thousand acres of land, including the farm of G. D. Mounts. From the sale of stock about \$2,500 was realized, and Mounts subscribed \$500 of stock in the corporation to be paid for in money and labor. The company bought a rig and other appliances and began to dig a well on the Mounts farm. The work was continued until October of 1914, when the company became insolvent, allowed its leases to lapse, and abandoned the enterprise. The rig, tools and appliances were left on the Mounts farm at the unfinished well. A number of persons who had performed labor for the company for which they had not been paid, brought actions before a justice of the peace upon their claims and recovered judgments. They served notices of garnishment on Mounts, on whose farm the rig, tools and appliances of the company were left, and he answered that he had actual possession of the company's property and had held it since the company had abandoned the enterprise. Afterwards the Hamilton-Collinson Hardware Company, which held a claim against the Arkansas City Oil & Gas Company for \$319.02 for merchandise sold to it, brought this action and procured the appointment of a receiver to take charge of the company's property. The laborers who had previously obtained judgments interpleaded in the action, and claimed a lien on the property by virtue of the garnishment proceeding. The court sustained the claims of the interpleaders, holding that the garnishment was effective and, no supersedeas bond being given on the appeal, the property was sold and the proceeds applied to the satisfaction of the judgments obtained by the laborers.

The plaintiff contends that, although the company had suspended operations, its lease of the Mounts farm had not been forfeited, and therefore its property cannot be said to be in Mounts' possession nor subject to garnishment in his hands. The lease contained a provision that—

"Upon failure of the lessee to drill the well or make any of the payments above provided for delay in completing a well on the date upon which the same becomes due, the lessor shall have the right to declare a forfeiture of the lease if such payment be not made within 10 days after written notice to pay the same."

Ordinarily where a lease contains a forfeiture clause the lessee's right cannot be terminated for a failure to comply



with its conditions until the lessor has declared a forfeiture after due notice has been given. Here the lessee is not asserting any rights under the lease. It is not complaining that there was no formal forfeiture or that no notice of an intention to forfeit was given, and although the officers of the company were witnesses in the case there was no intimation by them that the company claimed possession of the property in question. On the other hand, it had ceased operations, withdrawn from the Mounts farm, abandoned the whole enterprise, and allowed the Mounts lease, as well as all other leases, to lapse. By the lapsing of the lease and the abandonment of the enterprise the inchoate rights of the lessee in the Mounts lease were effectually terminated. Under the circumstances stated it was unnecessary for Mounts to give a ten-days notice and go through the formality of declaring a forfeiture. The law does not require the doing of vain things. The lessee's rights under a lease may be ended by abandonment, and as abandonment rests upon the intention of the lessee, whether or not that was its intention was a question of fact for the determination of the court. (*Rawlings v. Armel*, 70 Kan. 778, 79 Pac. 683; Thornton on The Law Relating to Oil and Gas, 2d ed., §§ 137, 140.) The abandonment in this instance was so open and notorious that there could be no dispute as to the intention of the company, and therefore notices and declarations could have served no purpose. The officers of the company are not now questioning in any way their relinquishment of their rights under the lease or the abandonment of the enterprise, and no one else can repudiate its abandonment for the company. The termination of the rights of the company left the property in the hands of Mounts, and the officers are not even now challenging the validity of his possession.

Some claim is made that he could not be garnished because he had not paid for his stock. The reasons on which this objection is grounded are not clearly stated, but it is unnecessary to examine them. Mounts was to pay for his stock with money and labor. He paid \$200 in cash and contributed labor to the enterprise, and, although there is a dispute as to the extent and value of the labor he performed, there is an indorsement on the stub of the stock certificate book, written by the secre-

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tary: "Paid \$200 and labor." This implies that sufficient labor had been performed to pay the balance due upon the stock, and upon the testimony and the general finding of the court it must be held that payment had been made.

The property of the oil and gas company was subject to be taken for its debts. That property was found in the actual possession of Mounts, and it is immaterial whether his possession is to be regarded as that of a stranger or as an agent of the company. In either event there is no reason why the property in his possession should not be garnished and appropriated to the payment of its debts. (*Ballston Spa Bank v. Marine Bank of Milwaukee, impleaded &c.*, 18 Wis. 490; *The First National Bank of Davenport v. The Davenport & St. Paul R. Co.*, 45 Iowa, 120; *Everdell and another v. The Sh. & F. du L. R. R. Co. and another*, 41 Wis. 395.)

The statute under which the proceeding was had provides among other things, in effect, that if a plaintiff makes oath in writing that he has good reason to believe that any person or corporation has property of the defendant in his possession or under his control he is subject to be garnished. (Gen. Stat. 1915, § 7732.) The property belonged to the defendant. A person had it in his possession. It was liable for the debts of the laborers who obtained the judgments, and no good reason is seen why the property was not reached by the garnishment process.

Judgment affirmed.

No. 21,159.

B. M. MCCUE, Appellant, v. J. W. HOPE, Appellee.

## SYLLABUS BY THE COURT.

1. **REOPENING ACCOUNT—Pleadings—Issues.** The enlargement of the issues beyond those specifically presented by the pleadings held not to have been prejudicial.
2. **SAME—Instruction.** Language in an instruction defining the character of the action held to have been in accordance with the decision of this court on a former appeal.
3. **SAME—Evidence Withdrawn.** The withdrawal of evidence with reference to one item of an account held not to have been erroneous.
4. **SAME—Evidence for Jury.** The evidence held to have warranted the submission to the jury of the controversy regarding several items of an account.

Appeal from Finney district court; GEORGE J. DOWNER, judge. Opinion filed December 8, 1917. Affirmed.

*F. Dumont Smith*, of Hutchinson, *Albert Hoskinson*, and *R. W. Hoskinson*, both of Garden City, for the appellant.

*William Easton Hutchison*, and *C. E. Vance*, both of Garden City, for the appellee.

The opinion of the court was delivered by

MASON, J.: B. M. McCue and J. W. Hope were the owners of the stock of a corporation. Hope sold his stock to McCue under a written contract which referred to a statement thereto attached, which purported to show the financial condition of the company. McCue brought an action against Hope on the ground that some existing liabilities of the company were not referred to in the statement, the correctness of which had been guaranteed by the defendant. A demurrer to the petition (or to the portion of it relating to this matter) was sustained by the trial court on the ground that the defendant's guaranty did not extend that far. On appeal, the contract was construed as sustaining the plaintiff's contention in this regard. (*McCue v. Hope*, 97 Kan. 85, 154 Pac. 216.) Upon the remanding of the case a jury trial was had, resulting in a verdict and judgment for the defendant. The plaintiff again appeals.

1. A reversal is asked chiefly upon the ground that although the answer (apart from the portion relating to another issue that has no bearing upon the matter) was a mere general denial, the defendant was permitted to introduce evidence tending to show that several errors were made in the statement, as a result of which the condition of the company was made to appear less favorable than accorded with the actual facts, and the jury were by the instructions authorized to give the defendant credit on account of such error. The plaintiff contends that this was an undue enlargement of the issues as presented by the pleadings, by which he suffered prejudice. It is true that the trial might have been facilitated by a detailed statement of the defendant's claims in the answer, but we do not regard the omission as justifying a setting aside of the verdict. The evidence as to all but two of the items on which the defendant claimed credit was withdrawn from the jury. While

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the plaintiff objected to a part of this evidence for various reasons, no objection was made, based specifically upon the ground that it referred to matters not pleaded. Had that point been raised at the trial an amendment might have been permitted. No delay to give opportunity to produce further evidence was asked by the plaintiff, and it does not appear that he suffered any substantial prejudice from the fact that the omitted items relied upon by the defendant were not mentioned in the answer.

2. In the course of its charge to the jury the trial court referred to the action as one "for an accounting or to reopen the account and settlement and remake it in accordance with the agreement of the parties." This language is criticised in the plaintiff's brief. It was, however, but a paraphrase of that used in the opinion of this court on the former appeal, where it said:

"It is insisted by the defendant that the case should be treated as an action for relief on the ground of fraud. . . . It is rather an action to open up an account and settlement between the parties, to make a new settlement, and to adjust the rights of the parties under their written agreement." (*McCue v. Hope*, 97 Kan. 85, 87.)

If the plaintiff was to be reimbursed on account of any liabilities of the corporation which were omitted from the statement, it is clearly just that the defendant should be compensated for any corresponding omission on the other side of the account, unless because of his failure to plead them, and as already indicated we do not regard his fault in this respect as fatal.

3. Complaint is made of the withdrawal from the jury of the evidence relating to what the plaintiff regards as an unlisted liability of the corporation. Some lumber appears to have been taken from a tract of land in which the company was interested as an agent, but no legal obligation was shown to rest upon the company with regard to it. Testimony was introduced to the effect that the defendant had promised the plaintiff to share with him any loss in this connection, but that did not tend to establish the existence of a demand against the corporation at the time the statement was made and acted upon, and the court was warranted in excluding the evidence as not within the issues, if it is regarded as tending to show a separate agreement upon the subject.

4. It is contended that the evidence did not warrant the submission to the jury of the items for which the defendant asked credit. One of them was an entry in the statement of \$300 as owing by the company to one E. J. Bross. Evidence was given tending to show that this was on account of \$300 paid to the company by Bross in a land trade, which was carried in this manner because the deal might not go through; that the transaction was completed and the money (less a commission) retained. This warranted a finding that the company was to that extent better off than the statement indicated. The testimony concerning what is called the Alley matter was not very clear, but was open to this construction: The statement included among the liabilities of the company an item of \$1,120 as owing to Alley & Nation; this claim was ill founded and was defeated. In that situation a credit to the defendant on that account was proper.

The judgment is affirmed.

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No. 21,160.

ERNEST SMITH, *Appellee*, v. B. F. BUSH, Receiver of the  
MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Defective Engine—Fire Loss—Train Sheets and Railroad Records as Evidence.* Although train sheets and records of a railway company, made before the occurrence of a fire could have been known, which show that no engine or train was operated at or near the place where the fire in question occurred, are entitled to great weight as evidence, this court cannot weigh the effect of them as against evidence of persons who testified that they saw an engine operating there at the time.
2. SAME—*Weight of Certain Evidence—Improper Instruction.* The following instruction should not have been given, in view of the character of the conflicting evidence upon the issue of fact to which it refers:  
“You are instructed that under the law of this state a positive statement of a witness as to an existing fact with relation to seeing or hearing a thing, which he was in a position to see or hear, is of greater value than the statement of a witness who testified that he did not see or hear a thing.”
3. SAME—*Two Acts of Negligence Alleged—Findings Sufficient.* The petition alleged the fire was caused by negligence in operating the engine, and also negligence in failing to provide sufficient devices to

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prevent sparks. In answer to a special question the jury found that the fire was caused by careless handling of the engine, or because of the defective condition of the smokestack. There was no evidence from which the jury could have answered differently. *Held*, following *Hilligoss v. Railway Co*, 84 Kan. 372, 114 Pac. 383, it was not necessary, in order to support the verdict, that the jury agree among themselves as to which of the two acts of negligence occasioned the fire.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed December 8, 1917. Affirmed.

*W. P. Waggener*, *Walter E. Brown*, both of Atchison, and *Al F. Williams*, of Columbus, for the appellant.

*C. A. McNeill*, of Columbus, and *E. B. Morgan*, of Galena, for the appellee.

The opinion of the court was delivered by

PORTER, J.: This is an action for damages to property alleged to have been destroyed by fire caused through the negligent operation of defendant's trains. Plaintiff recovered and defendant appeals.

The petition alleges that on the night of the 5th of December, 1915, between the hours of 10:50 and 11:30, the defendant operated a locomotive engine through the village of Carona in Cherokee county, that the engine was being run backwards and forwards through the station yards, and that defendant neglected to provide the engine with necessary devices, and sufficient spark arresters, to prevent the same from throwing out live sparks, and was negligent in handling and operating the engine, and suddenly threw on the steam with too great force, causing a powerful exhaust through the smokestack which caused the hot coal, cinders and sparks to be blown several hundred feet, setting fire to and destroying three buildings belonging to plaintiff of a value of \$2,100 and personal property located in the buildings. Judgment was asked for \$2,800 damages and for attorney's fees. The answer was a general denial and the further statement that defendant's engines were properly equipped and properly handled. At the first trial the jury disagreed. On the second trial there was a verdict for plaintiff for \$1,800 damages and \$150 attorney's fees.

1. The defendant seeks a reversal on the ground that the record discloses that the verdict is based upon perjured testimony. Plaintiff produced a number of witnesses who testified that they saw an engine on defendant's tracks before the fire. John Machetta, a coal miner, and his wife testified that between half past ten and half past eleven they were going home, and saw an engine on the track; that it was running down grade, was pulling hard and throwing lots of sparks. A boy of fifteen testified to the same thing, and a girl eleven years old testified that she saw the engine and that it was pulling hard. Two or three other witnesses testified to having heard an engine puffing on the tracks sometime before the fire occurred. The testimony showed conclusively that at the place where these witnesses claimed to have seen the engine, it must have been running down grade. None of these witnesses saw anything attached to the engine. Defendant produced four witnesses who testified they were near the station a short time before the fire broke out. One of these was the station agent of defendant and one was the superintendent of public schools of Carona. These two had just walked for a half mile on the tracks at the place and in the direction from which plaintiff's witnesses claimed to have seen an engine. All of the four testified there was no engine to be seen anywhere about. The defendant also produced the train sheets and train records and the testimony of the train dispatcher, all of which show that the last train through Carona before the fire was a little after 5 o'clock in the evening, and that the next train after that did not arrive until 12:30 in the morning, which was after the fire. We think the most that can be said is that the record disclosed a case which would have justified the trial court in granting a new trial. Notwithstanding the credence which must attach to the train sheets and records of the defendant showing the operation of its trains in that district, and obviously made before the occurrence of the fire could have been known, we cannot say that it was not possible for an engine to have been operating on the tracks in question at the time and place testified to by the witnesses for the plaintiff. The trial court heard and saw the witnesses and has approved the verdict, and regardless of what this court might think as to the weight of the testimony, we are foreclosed by the ruling of the trial court on the motion.

2. One of the principal contentions is that the trial court erred in giving the following instruction:

"You are instructed that under the law of this state a positive statement of a witness as to an existing fact with relation to seeing or hearing a thing, which he was in a position to see or hear, is of greater value than the statement of a witness who testified that he did not see or hear a thing."

It is insisted that this misled the jury, and was relied upon in the argument on behalf of plaintiff in the court below; that by the instruction the court overlooked and ignored the question whether or not defendant had offered any positive testimony to show that there was no engine there, and whether or not defendant's witnesses were in as good a position to see as plaintiff's witnesses, and whether or not they were equally credible witnesses. The defendant relies on *K. C. Ft. S. & G. Rld. Co. v. Lane*, 33 Kan. 702, 7 Pac. 587, in which a refusal to give such an instruction was held not error because it ignored all modifying circumstances and assumed that no positive testimony was offered by the other side. The decision has been followed and approved in *Mo. Pac. Rly. Co. v. Pierce*, 39 Kan. 391, 18 Pac. 305, and *Union Pacific v. Geary*, 52 Kan. 308, 34 Pac. 887. In view of the character of the testimony offered by defendant on the issue of whether there was any engine or train at the place in question, the instruction should not have been given, but we are not prepared to say that it constitutes in this case reversible error.

3. At the request of the defendant, special questions were submitted, among which the jury were asked in case they found the fire was caused by any negligence on the part of the defendant, then to state fully the act or acts of negligence of which the defendant, its agents or servants, were guilty. The answer to this question was as follows:

"Because of the careless handling of the engine, or because of the defective condition of the smokestack of the engine."

It is insisted these findings show that the jury have never agreed as to the act of negligence upon which they base their verdict; that six of them may have believed the engine was properly equipped but negligently handled; the other six may have believed from the evidence that the engine was properly handled, but negligently equipped. The defendant urges that



the case falls within the principle held controlling in the case of *Barker v. Railway Co.*, 89 Kan. 573, 132 Pac. 156, where a very similar question was involved, but which arose in a different manner. In that case, as in this, the petition alleged that the engine was negligently operated and also alleged negligence in the equipment as to attachments and devices. The trial court refused to submit certain special questions at the request of the defendant, the purpose of which was to require the jury, in case they found for the plaintiff, to state whether they believed from the evidence that the fire was occasioned by a defect in the engine or by reason of improper operation. A judgment in plaintiff's favor was reversed and a new trial ordered because of the refusal to submit these questions. In the opinion it was said:

"While the statute makes the setting out of a fire caused by the operation of a road *prima facie* evidence of negligence, still when the jury find that the fire originated from the engine they should be required, upon the request of the defendant, also to find whether it was caused by insufficient equipment or by improper management. We cannot agree with the contention of plaintiff's counsel, that if half of the jurors believed the fire was caused by a defect in the engine, and the other half, that it was caused by improper operation, the plaintiff would still be entitled to recover. If this were true there might be a consensus of opinion as to the liability of the defendant on twelve different bases on which such opinion could rest, each relied on by only one of the jurors and none by all. Their unanimous opinion as to the essential facts of the case, as well as to the general result, must be in favor of the prevailing party." (p. 576.)

The doctrine of that case, however, has no room for application in the present case, for the reason that there was no evidence from which the jury could have returned a different answer. The defendant claimed that it had no engine operating at that place, and while the answer alleged that its engines were properly equipped and properly handled, no evidence was offered in support of this defense. Proof that the fire was caused by the operation of the railroad is *prima facie* evidence that it was the result of negligence. (Gen. Stat. 1915, § 8473.) The case is controlled by the decision in *Hilligoss v. Railway Co.*, 84 Kan. 372, 114 Pac. 383, where the jury were unable to determine from the evidence whether the fire was caused by negligence in operation or in equipment of the engine, and returned as an answer to the question, "Don't know." The de-

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fendant asked that they be required to make a more definite answer, and complained that the court refused its request. It was held that because of the presumption created by the statute—

"It is not necessary, in order to sustain a verdict for the plaintiff, that the jury shall be able to specify in what respect the defendant was negligent." (Syl. ¶ 3.)

It was said in the opinion—

"If in the present action, no evidence whatever had been introduced on the subject of negligence, beyond the bare fact that the fire was set out by the defendant's engine, and the same questions had been submitted, the jury would necessarily have answered them just as they did." (p. 374.)

The statutory presumption prevails until it is met with evidence sufficient, in the minds of the jury, to overcome the presumption. In the present case, there being no evidence on the question, it was not necessary that the jury should agree among themselves as to which kind of negligence charged in the petition was, in fact, the proximate cause of plaintiff's loss.

The judgment is affirmed.

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No. 21,198.

THE STATE OF KANSAS, *Appellee*, v. ED KING, *Appellant*, et al.

## SYLLABUS BY THE COURT.

1. **WITNESS**—*Improper Impeaching Questions on Cross-examination.* The credibility of a witness may be impeached on cross-examination by showing that he has previously made statements inconsistent with or contradictory to his evidence given on the trial; but it is not reversible error to exclude previous explanation of prior contradictory statements, when that explanation is not contradictory to or inconsistent with his evidence on the trial.
2. **ROBBERY**—*Using Automobile—Competent Opinion Evidence.* Where the evidence tends to show that a robbery was committed in a store by four persons who came in an automobile, two of whom remained in the automobile in front of the store, while the other two committed the robbery, evidence may be introduced to show that those who afterward sat in an automobile in front of the store, under conditions similar to those existing at the time of the robbery, could see into the store to the place where the robbery was committed.
3. **SAME**—*Trial—Photograph Competent Evidence.* A photograph of one charged with the commission of a crime may be introduced in

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evidence for the purpose of corroborating a witness who identifies the one charged, and the fact that it was found in a rogue's gallery does not render the photograph incompetent.

4. *SAME—Statements of Defendant on Former Trial—Competent.* The testimony of a defendant in a criminal action, given on a former or another trial, may be introduced in evidence against him.
5. *SAME.* The evidence has been examined and it is held that it was sufficient to sustain the verdict, and that the verdict was not contrary to law nor to the evidence.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed December 8, 1917. Affirmed.

*J. R. Charlton*, and *H. C. Farrell*, both of Bartlesville, Okla., for the appellant.

*S. M. Brewster*, attorney-general, and *Don H. Elleman*, county attorney, for the appellee; *F. W. Boss*, of Columbus, of counsel.

The opinion of the court was delivered by

MARSHALL, J.: Ed King appeals from a judgment sentencing him to the penitentiary for robbery in the first degree. He was jointly charged with Floyd S. Buchan. Numerous errors concerning the admission and rejection of evidence are assigned.

1. The defendant insists that he was not permitted to cross-examine Walter Elder who was present at the robbery and who was one of the state's witnesses. Elder testified that one Tom Jarrett, another of the state's witnesses, who was also present at the robbery, was the first one approached and robbed. On cross-examination, Elder testified that on former trials he had testified that he was the first one approached and robbed. Other questions asked on cross-examination indicated that the witness had on another trial testified, in substance, that Jarrett was the first one approached and robbed, and that an explanation of his contradictory statements was then given by the witness. He was questioned concerning that explanation, and the testimony was excluded. The explanation given by the witness concerning the previous contradictory statements that had been made by him did not appear to be in contradiction of any statement made by him on the last trial in

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the present action. It was permissible to permit the defendant to cross-examine the witness concerning contradictory statements that had been previously made by him on other trials. (*The State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; 40 Cyc. 2687.) This rule does not permit the cross-examination of the witness concerning previous statements contradictory to each other, but not contradictory to his evidence on the trial. No reversible error was committed in restricting the cross-examination to statements previously made by the witness contradictory to or inconsistent with his testimony on the trial.

2. The state's evidence tended to show that the robbery had been committed by four men who went to a store in Melrose and robbed the store and a number of people in it; that two of the men went into the store and did the robbing, while the other two remained in the automobile in front; and that the four men left in the automobile immediately after the crime had been committed. Walter Elder testified that afterward he sat in an automobile in front of the store under the same conditions as existed on the night of the robbery; and that he could see back into the store to where the people were at the time of the robbery. The defendant complains of the admission of that evidence. It was admissible. (*Mo. Pac. Rly. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607; *The State v. Asbell*, 57 Kan. 398, 46 Pac. 770.)

3. Tom Jarrett testified that he went to Tulsa, and there, at the police headquarters, out of a large number of photographs, identified one of the defendant Buchan; and that he identified Buchan as one of the men who had committed the robbery. The defendant complains of the admission of evidence concerning the photograph. The defense contended that Buchan was not in the store at the time the robbery was committed. The identity of Buchan was material. The evidence concerning the photograph corroborated Jarrett in his identification of Buchan, and the admission of that evidence was not erroneous. (17 Cyc. 414; 6 Ency. of Ev. 931; 8 Ency. of Ev. 145.)

4. Complaint is made of the admission of the evidence of defendant King given on a former trial. He did not testify on the trial which resulted in the judgment from which this appeal is taken. What he said on the former trial was competent

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evidence against him, and could be testified to by any witness who heard it, or by the court reporter, reading from his notes taken at the time. (*The State v. Miller*, 35 Kan. 328, 10 Pac. 865; *The State v. Rogers*, 56 Kan. 362, 43 Pac. 256; *The State v. Nelson*, 68 Kan. 566, 75 Pac. 505; *The State v. Harmon*, 70 Kan. 476, 78 Pac. 805; *The State v. McClellan*, 79 Kan. 11, 98 Pac. 209; *The State v. Stewart*, 85 Kan. 404, 116 Pac. 489; *New v. Smith*, 94 Kan. 6, 12, 145 Pac. 880; *The State v. Chadwell*, 94 Kan. 302, 146 Pac. 420; Gen. Stat. 1915, § 3003.)

5. The defendant insists that the verdict was contrary to the law and to the evidence, and was not sustained by the evidence, and to support his contention calls attention to the entire record on this appeal. The entire record includes all the evidence. It is impossible to detail that evidence in an opinion. The manner and demeanor of the witnesses on the witness stand, their interest in the result of the trial, and the relation of the various parts of the evidence to each other cannot be described so as to convey an intelligent understanding of the evidence. The evidence was sufficient to sustain the verdict, and that verdict was not contrary to law nor to the evidence.

There are a number of other complaints concerning the admission of evidence. Each complaint has been examined. There is nothing in any of them that warrants a reversal of the judgment. It will not satisfy the defendant, nor be of any benefit to others, for the court to discuss these complaints in detail.

The judgment is affirmed.

No. 21,308.

**ALFRED LESLIE, Appellee, v. THE PROCTOR & GAMBLE MANUFACTURING COMPANY, Appellant.****SYLLABUS BY THE COURT.**

1. **MINOR SON—*Personal Injuries—Compromise and Settlement—Authority of Parent—Judgment by Consent.*** Where a minor has sustained personal injuries, which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries, notwithstanding the settlement negotiated by his father.
2. **SAME.** An inadequate settlement by a father for his minor son's injuries does not bar an action by the son on attaining his majority, although the father and the wrongdoer had, by agreement, filed an action in a city court (like that of a justice of the peace) for the agreed sum, and judgment had been taken thereon against the wrongdoer without evidence, without judicial consideration, and with only a perfunctory entry of the judgment by the city court for the agreed sum.
3. **JUDGMENT IN CITY COURT—*Extrinsic Fraud—Jurisdiction of District Court to Set Aside.*** In the circumstances narrated in paragraphs 1 and 2 of the syllabus, it was unnecessary for the son to give any countenance to the judgment in the city court nor to appeal from that judgment; he could properly proceed by an independent action in a court having general jurisdiction, both at law and in equity, and have the judgment of the city court set aside as a pertinent incident to the securing of adequate redress for his injuries.
4. **MINOR — *Injuries—Settlement by Parent—Judgment by Consent—Rights of Minor Son on Attaining His Majority—Pleadings.*** On attaining his majority the plaintiff brought an action in the district court in which his petition, in substance, alleged that when he was seventeen years old he sustained an injury to his hand while in defendant's employ and through the latter's negligence; that his father without authority settled plaintiff's claim for damages for \$300—a grossly inadequate sum; that an attorney employed by defendant filed an action against the defendant in a city court for the agreed amount; that another attorney employed by defendant confessed judgment for the agreed amount; that there was no trial, no evidence, no judicial consideration of the facts, nor of the propriety or adequacy of the settlement. All the pertinent facts were pleaded. *Held*, that a demurrer to such a petition was properly overruled.
5. **SAME—*Action in District Court—Continuance Pending Appeal.*** When a litigant has determined to bring an intermediate appealable order of the district court to the supreme court for review, he commits no impropriety and loses no rights by suggesting to the district court

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the advisability of continuing the cause in the trial court until the supreme court determines the question presented by the appeal.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed December 8, 1917. Affirmed.

*C. Angevine*, of Kansas City, for the appellant.

*J. O. Emerson*, and *David J. Smith*, both of Kansas City, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff brought this action for damages sustained while in defendant's employment by an injury to his hand. The petition alleged that in 1912, when plaintiff was a minor about seventeen years old, he was employed in defendant's packing house; that while so employed he slipped and fell on a wet and oily floor and his hand was caught and crushed in a box-nailing machine; that the machine was defective, and had no fender or guard about it; and that it was practical to have such a guard. It was also alleged that in 1913 the defendant made an agreement with plaintiff's father whereby defendant was to pay plaintiff and his father the sum of \$300 in settlement of plaintiff's claim for the injuries sustained by him, and that a judgment for that agreed sum should be rendered for plaintiff and against the defendant in a city court (like that of a justice of the peace) in Kansas City, Kan. That pursuant thereto, the defendant's attorney caused a petition to be drawn, entitled "Alfred Leslie, a minor under the age of twenty-one, by and through his father as guardian and next friend, Willey Leslie, plaintiff, versus The Proctor & Gamble Manufacturing Company, a corporation, defendant," wherein it was alleged that the plaintiff was entitled to recover from the defendant the sum of \$300 for the injuries to the plaintiff. The defendant employed another attorney to sign the said petition as attorney for the plaintiff, but the said attorney was not in fact attorney for the plaintiff, but was one of the attorneys for the defendant. The petition continues:

"That the defendant, by its attorneys . . . caused the . . . petition to be filed in the city court, . . . and caused a judgment to be

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entered . . . in favor of the plaintiff Alfred Leslie and against [itself] . . . for \$300.00. . . .

"The aforesaid judgment was entered solely by agreement and consent of the defendant and Willey Leslie; no trial was had before the court, and no evidence was offered or presented to the court. No hearing or inquiry was made by the court into the merits of the case or of the rights of the plaintiff, and no judicial examination of the facts was made by the court to determine whether the settlement was reasonable and proper. . . . At the time of said proceeding Willey Leslie was not the legal guardian of Alfred Leslie, nor was he appointed by the said city court as next friend of Alfred Leslie, nor did he qualify as next friend of Alfred Leslie in the said action in the city court.

"The plaintiff has been and is greatly aggrieved and hindered by the said settlement and judgment in the city court; said settlement was not fair to the plaintiff, and plaintiff was thereby deprived of his substantial rights, and has been and will be defrauded out of a large sum of money, to wit, three thousand dollars (\$3,000.00), which he should recover from the defendant unless said settlement and judgment is set aside. The said proceeding and judgment were illegal, null and void and should be vacated and held for naught. As against said judgment the plaintiff has no adequate remedy at law. . . .

"The plaintiff Alfred Leslie became twenty-one years of age August 21st, 1916, and he disaffirmed the aforesaid settlement for three hundred dollars (\$300.00) within a reasonable time after he became of age, by bringing this suit on the 12th day of September, 1916.

"The plaintiff has not had any power or control of any part of the Three Hundred Dollars (\$300.00) paid on said pretended settlement, since the plaintiff arrived at the age of majority."

Defendant's demurrer to plaintiff's petition was overruled, and the correctness of this ruling is the subject of this review.

The appellee raises a preliminary question—that defendant cannot have this ruling determined at this time because its counsel filed a motion in the district court alleging that it had appealed to the supreme court on the ruling on the demurrer, and that—

"This defendant therefore respectfully requests this court to make an order staying further proceedings in this court until said appeal shall have been disposed of by the supreme court."

The rule announced in *U. P. Rly. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157, does not cover the incident at bar. The defendant, having appealed, could ask for nothing from the district court as a matter of right, but there was no impropriety in suggesting a stay, a continuance, until the supreme court had determined the question appealed. The practice of asking a con-



tinuance or suggesting to the trial court its propriety when an intermediate appeal is taken, is common, although it is not ordinarily made with the formality of a written motion.

Passing then to the main question, it is defendant's contention that the district court had no jurisdiction to entertain this cause as an independent action, and that it could only exercise an appellate jurisdiction to affirm, reverse, modify or vacate the judgment of the city court. Defendant also insists on the application of the ordinary rule that a judgment can only be vacated in the court in which it is rendered.

In this case, however, it should be noted that the petition contains allegations of extrinsic fraud not involved in the issues in the city-court case, and the judgment is therefore properly subjected to a direct attack. Moreover, the judgment in the city court was not upon the merits, but upon an unauthorized agreement between plaintiff's father and the defendant. There was no judicial consideration of the matter at all in the city court—not even on the question whether the infant's interests were being protected by the agreement to which the city court was asked to give its judicial sanction. There was in fact no judgment in any proper sense, but merely a mummery of form in a vain endeavor to give some colorable judicial approval of the settlement.

In *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529, it was held that an independent suit could be maintained to set aside a sale of property, and to set aside an administrator's deed thereto which had been procured through extrinsic fraud.

In *Fincke v. Bundrick*, 72 Kan. 182, 83 Pac. 403, where a sale of real estate had been made by an executor pursuant to an order of the probate court fraudulently procured, a minor whose interests had been sacrificed in such sale was permitted on attaining her majority to maintain an action to set aside the sale and to set aside the executor's deed. The court said:

"Since it was not possible for the plaintiff to obtain relief in the probate court, administration having been closed and the executor finally discharged, the district court had jurisdiction to entertain her suit. (*Gafford, Guardian, v. Dickson, Adm'r*, 37 Kan. 287, 15 Pac. 175; *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529.)" (p. 189.)

It is not discernible how the wrongs of plaintiff, alleged in his petition, could have been redressed in the city court nor

by an appeal from that judgment. The city-court judgment, treating it as a *bona fide* judgment, was for the full amount prayed for in the petition prepared by an attorney furnished by defendant and filed by him under the unauthorized agreement made with plaintiff's father.

In *Railway Co. v. Lasca*, 79 Kan. 311, 100 Pac. 278, an independent action in an infant's behalf was entertained to set aside a judgment theretofore rendered in favor of the infant for an inadequate sum for personal injuries. That action was brought in the same court—a court of record—in which the prior judgment had been rendered. This court said that “as a general rule a judgment can only be vacated in the court in which it was rendered.” (p. 320.) But as we have seen in *McAdow v. Boten*, and *Fincke v. Bundrick*, *supra*, the jurisdiction of the district court may be invoked to set aside judgments of an inferior court for fraud extrinsic to the issues, without the formality of seeking their correction in the inferior court which rendered such judgment. And if this may be done with reference to such judgments in the probate court, it may certainly be done with reference to such judgments of a city court whose status is but that of a justice of the peace. In 1 Black on Judgments, section 297, it is said:

“The power to vacate judgments is said to be incident to all courts of record, and to be usually exercised under restraints imposed by their own rules. It is not commonly possessed by the inferior tribunals—courts not of record—such as the courts of magistrates or justices of the peace, though in some of the states it may be.”

Where the fraud complained of is extrinsic to the issues, an independent action is permitted and ordinarily equitable relief is a necessary and pertinent feature of such an action, and it is not necessary to bring it in the inferior court where the first judgment was rendered, especially if such court has no equitable jurisdiction. Moreover, a mere vacation of the collusive judgment in the city court was not all the relief the plaintiff was entitled to. Tested by defendant's demurrer, he is entitled to relief for a sum ten times greater than the city court could give.

It is urged that the plaintiff's petition is but a collateral attack on the judgment entered in the city court. We think not. It is a direct attack.

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Proceedings instituted for the purpose of destroying, impairing, or modifying the force or effect of a judgment for all cases, such as proceedings to reverse, vacate, set aside, declare void, suspend, modify, or perpetually enjoin a judgment, are direct proceedings." (*Mastin v. Gray*, 19 Kan. 458, 466.)

As against a demurrer the petition sufficiently alleged the plaintiff's grievances, the misconduct of defendant and of plaintiff's father; it shows that there was in fact no trial, no judicial consideration, no *bona fide* judgment, but merely a complaisant and perfunctory acquiescence by the city court in the unauthorized settlement; it shows the predicament of plaintiff on account of the collusive proceedings; and that only the strong arm of a court of equity can sweep the rubbish of the settlement out of his way so that his wrongs may be adequately redressed.

In all the discussion of the facts of this case, it should not be overlooked that the court only assumes the facts pleaded in the petition to be true for the purpose of testing the propriety of the demurrer. The proof may wholly fail. When defendant answers and the evidence is adduced, a radically different state of affairs may be disclosed. But the facts as pleaded do disclose that plaintiff has no other adequate remedy, and the demurrer to his petition was properly overruled.

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No. 21,332.

S. F. HELMS, *Appellee*, v. THE EASTERN KANSAS OIL COMPANY, LIMITED, et al., *Appellants*.

## SYLLABUS BY THE COURT.

1. OIL REFINERY—*Escaping Oil and Poisonous Substances—Material Injury to Another—Nuisance.* If the owner of a refinery permits oil, refuse and poisonous substances in large quantities to escape from the refinery and flow over and upon the land of his neighbor, causing material injury to the neighbor, the use of the refinery will be deemed to be unreasonable and to constitute a nuisance.
2. SAME—*Conducting Lawful Business—Liability for Damages to Adjoining Property.* The fact that the business of the refinery is in itself a lawful one, and that the owner of it operates it carefully, will not exempt him from liability for casting oil, refuse and poisonous substances on the land of the plaintiff in such quantities as to cause him substantial injury.

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3. *SAME—Injury to Adjoining Property—Measure of Damages.* The liability of the defendant in such a case is measured by the rules in relation to a nuisance instead of those governing cases of negligence.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed December 8, 1917. Affirmed.

*Charles H. Apt, and Frederick G. Apt, both of Iola, for the appellants.*

*C. S. Ritter, of Iola, for the appellee.*

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was brought by S. F. Helms against the Eastern Kansas Oil Company, Limited, to recover damages alleged to have been caused through the operation of defendant's oil refinery, which is situated near the corner of plaintiff's farm, which he has occupied as a homestead for many years. A small natural watercourse flows through the refinery grounds and across the north half of plaintiff's farm. On May 1, 1914, the plaintiff brought an action against the defendant, claiming damages because of the oil, poisonous substances and fumes which the defendant had allowed to escape from the refinery and pass over his farm, causing injury to the land, and also to some of his cows. The trial of that case resulted in a judgment in defendant's favor as to the injury to the land, but in favor of the plaintiff as to the injury to the cows. That judgment stands as a finality, and the award made against the defendant has been paid and satisfied. On October 1, 1915, the present action was begun, in which the plaintiff averred that during the last two years, and especially since May 1, 1914, the defendant had permitted large quantities of oil, refuse and poisonous substances to escape from its premises and run upon and over his land, and also that it had contaminated the air with foul and ill-smelling gases and vapors which were carried upon his farm and into his residence. There was an allegation that the defendant had enlarged its plant since May 1, 1914, and that the flow and passage of oil, fumes and poisons had been correspondingly increased, with the result that his land had been injured to the extent of \$1,000, and that, in addition to the damage to the land, his orchard and trees had been injured and the health and comfort

of the family impaired, for which he asked \$2,000. A motion of defendant to require the plaintiff to separately state and number his causes of action was overruled, the court holding that only a single cause of action had been pleaded. The defendant answered that it was carrying on the refinery business in a lawful and proper way; that the stream that flows through the premises of both is a natural watercourse; that the use it made of the stream was lawful and proper; and that if any substances had flowed upon plaintiff's land, it was due to excessive rainfall—an act of God; and further, that the claims made by the plaintiff had either been adjudicated, or were barred by the statute of limitations. At a trial on these issues a jury returned a verdict awarding plaintiff \$300, and also special findings that plaintiff's land was as valuable on October 1, 1915, as it had been on May 1, 1914, and that the trees, for the destruction of which plaintiff asked damages, had died from improper care and from neglect. On the motion of the defendant the court set aside the special findings and verdict and granted a new trial. The plaintiff then amended his petition, setting forth the creation and maintenance of a nuisance on plaintiff's land by permitting the escape of and the throwing of poisonous substances and vapors over it, for which he asked \$3,000. He also alleged special injury to the live stock which decreased the quantity of milk given by his cows, amounting to \$665, and for the destruction of crops and pasture he asked \$300. In this petition he alleged that since May 1, 1914, the defendant had increased the equipment of its plant, which increased the injury to his land and other property. The answer which the defendant made to the first petition was refiled as the answer to this petition. The court ruled that this petition stated a single cause of action, and it instructed the jury that the former adjudication constituted a bar to a recovery of any depreciation in or damage to the land which had occurred prior to May 1, 1914, and that only such damages could be recovered as had been caused since that time through the enlargement of the defendant's refinery and increased flow of refuse matter upon the land. The jury were further instructed that the former judgment would not bar a recovery for the alleged loss of crops and pasture and injury to live stock. The second trial of this case resulted in findings that

the defendant had not increased the output of its plant since May 1, 1914, and that the land had not decreased in value since that time. There was a finding by the jury that the plaintiff had sustained no loss through the wrongful acts of the defendant, except for injury to the grass on twenty-five acres of pasture land.

In its appeal defendant complains of the ruling refusing to require the plaintiff to separately state and number his causes of action, insisting that the claim for general damages to the land constituted a distinct cause of action, and that the claim for special damages to other property constituted a different cause of action. Since the jury has specifically found that the land was not injured, and has only awarded damages upon the single item of the loss of the grass, the question is no longer material. Nor is there any good ground for the complaint of a variance between the original and amended petitions.

It is contended that the averments in the plaintiff's amended petition did not warrant a recovery, and therefore defendant's demurrer should have been sustained. This contention is based mainly on the ground that in the petition there was no allegation of any unnecessary act of the defendant in the construction or operation of the refinery, nor any averment that in its operation it was guilty of any negligent act or omission. Defendant insists that the business is a lawful one and that there can be no liability to the plaintiff as a result of the operation of the refinery in the absence of negligence of the defendant. Plaintiff's action as pleaded must be regarded as one for nuisance rather than negligence. An owner of property, although conducting a lawful business thereon, is subject to reasonable limitations. He must use his property so as not to unreasonably interfere with the health or comfort of his neighbors, or with their right to the enjoyment of their property.

"If he makes an unreasonable or unlawful use of it, so as to produce material injury or great annoyance to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage." (*Fogarty v. Pressed Brick Co.*, 50 Kan. 478, 487, 31 Pac. 1052.)

In *Stotler v. Rochelle*, 83 Kan. 86, 109 Pac. 788, the court in defining a nuisance said:

"It is of course not necessary that the use to which property is put shall be unlawful in itself in order to constitute it a nuisance in the eye of the law." (p. 88.)

Nor will the fact that the business is carried on carefully and in accordance with the ordinary methods employed in such a business relieve one from liability to a neighbor if the use is unreasonable and such as constitutes a nuisance. In *Hauck v. Pipe Line Co., Ltd.*, *Appellants*, 153 Pa. St. 366, it was said:

"If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business, and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation under the law of this state. Hence, there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful, and he has exercised care in carrying it on." (p. 375.)

Whether or not a use which in itself is lawful is a nuisance depends upon a number of circumstances—locality and surroundings, the number of people living there, the prior use, whether it is continual or occasional, and the extent of the nuisance and injury caused to the neighbor from the use. If the injury is slight and trivial and occurs in the development of the natural resources of the land it is not deemed to be unreasonable. (*Phillips v. Brick Co.*, 72 Kan. 643, 82 Pac. 787.) The oil that was treated by the defendant at the refinery was obtained elsewhere, and its operations had no connection with the products of the land or the development of its natural resources. Taking the averments of the plaintiff it is clear that the quantity of oil, refuse, fumes and gases that were thrown upon plaintiff's land constituted an unreasonable use and a nuisance. However useful and lawful the business in itself is, the defendant cannot be permitted to carry it on in such a way as to cause material injury to the plaintiff. When the injurious substances were thrown upon plaintiff's land in the excessive quantities and in the manner set forth in plaintiff's petition, the defendant's use of its property became both

unreasonable and unlawful. In the leading case of *Fletcher v. Rylands*, L. R. 1 Exch. 263, it was said:

"The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench." (p. 280)

(See, also, *Gilmore v. Salt Co.*, 84 Kan. 729, 115 Pac. 541; *Kansas City v. Serum Co.*, 87 Kan. 786, 125 Pac. 70; *McCarty v. Natural Carbonic Gas Co.*, 189 N. Y. 40; *Hauck v. Pipe Line Co., Ltd., Appellants*, 153 Pa. St. 366; Note, 15 L. R. A., n. s., 535.)

Error assigned in the overruling of the demurrer to plaintiff's evidence is not available, as the evidence is not preserved in the record. The objections to the instructions have been answered in part in what has been said on the contention that a cause of action was not stated in the amended petition, and we find nothing substantial in the other objections to the rulings on the instructions.

The judgment of the district court is affirmed.



No. 21,472.

REMIGI RICARDO (F. B. WHEELER and C. A. MCNEILL, *Appellees*), v. CENTRAL COAL & COKE COMPANY et al. (D. G. SMITH, *Appellant*).

## SYLLABUS BY THE COURT.

1. ATTORNEY'S LIEN—*Application for Allowance—Affidavits as Evidence.* An application for the distribution of a fund against which several attorneys' liens are claimed is a motion, and the code permits the use of affidavits at the hearing thereof.
2. SAME—*Evidence—Affidavits—Cross-examination of Affiants.* An attorney whose claim of lien is denied at such a hearing, because the court is convinced from his own testimony that he has performed no services entitling him thereto, has no standing to complain of the refusal to allow him to cross-examine the makers of affidavits used in behalf of other claimants.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed December 8, 1917. Affirmed.

*D. G. Smith*, of Girard, and *S. L. Walker*, of Columbus, for the appellant.

*F. B. Wheeler*, of Pittsburg, and *C. A. McNeill*, of Columbus, for the appellee; *Maurice McNeill*, of Kansas City, Mo., of counsel.

The opinion of the court was delivered by

MASON, J.: Remigi Ricardo sued the Central Coal & Coke Company on account of injuries received while in its employ. He recovered a judgment which was reversed upon appeal by reason of the instructions given and refused, a new trial being ordered. (*Ricardo v. Coal & Coke Co.*, 100 Kan. 95, 163 Pac. 641.) Up to this point in the litigation he was represented by F. B. Wheeler, C. A. McNeill and Maurice McNeill. After the reversal the case was settled for \$2,500, which the defendant paid into court. Claims of attorneys' liens were made by the attorneys named, and also by D. G. Smith. A hearing was had upon motions for the distribution of the fund. The court allowed the claim of Wheeler and the McNeills and denied that of Smith, who appeals.

Smith contends that he had an oral contract with the plaintiff for the handling of the case before the other attorneys had

had any communication with him; that while he took no part in the litigation prior to the reversal of the judgment, the settlement was brought about by his efforts. His contentions are disputed by the plaintiff and the other attorneys. The grounds upon which a reversal is asked are that the court (1) permitted the appellees to introduce affidavits in evidence, the makers of which were present at the time, and (2) refused to allow the appellant to call the affiants for cross-examination.

1. The statute provides that where a judgment upon which an attorney's lien is claimed is paid to the clerk, the court or judge may "on application of any party interested," determine the amount due on the lien, if any, and "make an order for the distribution of said moneys according to the respective rights of the parties." (Gen. Stat. 1915, § 485.) The application referred to conforms to the statutory definition of a motion, being "an application for an order, addressed to the court, or a judge in vacation, by any party to a suit or proceeding, or one interested therein or affected thereby." (Gen. Stat. 1915, § 7460.) The code specifically authorizes affidavits to be used "upon a motion." (Gen. Stat. 1915, § 7254.) It is therefore manifest that no error was permitted in allowing affidavits to be introduced.

2. Where the maker of an affidavit relating to a controverted question of fact material to the decision of a case is present at the hearing, the refusal of the court to allow him to be cross-examined by the opposing counsel might in some cases be regarded as an abuse of discretion, because of its amounting to a rejection of a convenient, effective and usual means of testing the truth of testimony upon which the investigation may turn. But here the trial court expressly stated the reason for disallowing the claim of the appellant to be that it was convinced by his own testimony that he had done nothing to entitle him to a lien. A cross-examination of the witnesses for the appellees might have tended to impair the claim of the other attorneys to a lien, but if the appellant had no lien of his own he had no standing to challenge theirs, and as the court found from his own statements that he was not entitled to a lien he manifestly suffered no prejudice from being denied an opportunity to cross-examine the witnesses or to go more fully into any other question.

The judgment is affirmed.

No. 21,525.

THE KELLEY & LYSLE MILLING COMPANY, *Appellee*, v. L. SCHREIBER, doing business as the L. SCHREIBER GRAIN COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. **REPORT OF REFEREE**—*"Decision of Court"*—*Judgment Thereon*. Under section 300 of the civil code, the report of a referee, determining the whole issue by findings of fact and conclusions of law separately stated, stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court.
2. **SAME**—*When Motion for New Trial Must Be Filed*. The word "decision," in section 306 of the civil code, providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue, stating facts found and conclusions of law separately.

Appeal from Wyandotte district court, division No. 2; FRANK D. HUTCHINGS, judge. Opinion filed December 8, 1917. Dismissed.

*William G. Holt, J. K. Cubbison*, both of Kansas City, and *S. I. Hale*, of La Crosse, for the appellant.

*A. F. Sherman, Thad B. Landon, A. L. Berger*, all of Kansas City, and *John H. Atwood*, of Lawrence, for the appellee.

The opinion of the court was delivered by

BURCH, J.: In the district court the plaintiff recovered. The defendant appealed, and the plaintiff moves to dismiss the appeal on the ground the notice of appeal was not served in time.

The issues of fact and of law were referred to a referee, who filed his report on October 17, 1911. Findings of fact and conclusions of law favorable to the plaintiff were separately stated. The defendant promptly filed a motion for a new trial and a motion to set aside the report. The plaintiff filed a motion to confirm the report. These motions were argued in September, 1914, and were taken under advisement until March 18, 1916, when the motion for a new trial was denied, the motion to set

aside the report was denied, the motion to confirm the report was granted, and judgment was entered for the plaintiff. Within three days the defendant filed a second motion for a new trial. This motion was denied on May 26, 1917, and notice of appeal was served on June 13, 1917. The plaintiff contends that the second motion for a new trial served no legal purpose, and that the appeal should have been taken within six months from March 18, 1916, when the first motion for a new trial was denied and judgment was rendered. The defendant contends that the first motion for a new trial was nugatory, and that the time within which the appeal might be taken is to be computed from the date on which the second motion for a new trial was denied. The question is, when must the motion for a new trial be filed in cases referred to a referee to determine the entire issue.

The status of the report of a referee is established by section 300 of the code of civil procedure, which reads as follows:

"A trial before referees is conducted in the same manner as a trial by the court. He may require the court stenographer, when not otherwise engaged, to attend, take and transcribe the testimony in the case. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court, upon such trial. They must state the facts found and the conclusions of law separately, and their decisions must be given and may be reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the referee is to report the facts, the report has the effect of a special verdict." (Gen. Stat. 1915, § 7200.)

This section is substantially the same as section 293 of the old code (Gen. Stat. 1901, § 4740). The only changes made by the new code were that here, as elsewhere, exceptions allowed by the old code were eliminated, and authority to require the services of the court stenographer at the trial was added. The result is that when the report of the referee came in, covering the whole issue by findings of fact and conclusions of law separately stated, the report stood as the decision of the court, and judgment might have been entered thereon for the plaintiff in the same manner as if the trial had been by the court. The language of the statute is too plain to permit

quibbling about it, and applied to the present controversy gives the following equation:

Report of referee = decision of the court.

How could the defendant avoid judgment against him on the report?

The defendant might desire to attack the report without asking for a reëxamination of the facts. If so, he could file a motion stating the grounds. If the motion were denied and the report confirmed, an appeal would lie from the order under the fourth clause of the second subdivision of section 565 of the code:

"The supreme court may (also) reverse, vacate or modify any of the following orders of the district court or a judge thereof, or of any other court of record, except a probate court. . . . *Second*—An order that discharges, vacates or modifies a provisional remedy; or that grants, refuses, vacates or modifies an injunction; or that grants or refuses a new trial; or that confirms or refuses to confirm the report of a referee; or that sustains or overrules a demurrer." (Gen. Stat. 1915, § 7469.)

If the defendant desired a reëxamination of the issues of fact, his remedy was by motion for a new trial. Section 305 of the code tells what a new trial is and for what causes a new trial should be granted. The statute uses the three expressions—"verdict by a jury, report of a referee, or a decision by the court."

When must the motion for a new trial be filed? Under the old code (§ 308), there were two time limitations—within three days, and at the same term of court. (Gen. Stat. 1901, § 4756.) Under the new code there is but one time limitation—within three days (§ 306). Within three days of what? The old code used the three expressions—verdict, report, decision. The new code says, "after the verdict or decision is rendered."

It is not disputed that the word "decision" includes the decision of the court when the trial is by the court. When a cause is tried by the court, the announcement of findings of fact and conclusions of law constitutes the decision of the court, within the meaning of the code provision requiring a motion for a new trial to be filed within three days. (*Brubaker v. Brubaker*, 74 Kan. 220, 222, 86 Pac. 455.) Under section 300 of the code, the report of a referee, determining the issues by

findings of fact and conclusions of law separately stated, "stands as the decision of the court," and the first term of the equation stated above may be substituted for its equivalent in section 306. The word "verdict" as used in section 306 includes the report of a referee, when the issues of fact only are referred. There are two kinds of verdict, general and special (§ 294), and if the issues determined by either kind are to be reëxamined, it must be on motion for a new trial made within three days after the verdict is returned. But by express provision of section 300, "when the referee is to report the facts the report has the effect of a special verdict."

The result of the foregoing is that the time limitation of three days contained in section 306 covers every form of trial, whether by jury, by referee, or by the court, and in case of trial by a referee must be computed from the time the report is filed.

If a review of the action of the court in disposing of a motion for a new trial leveled against the report of a referee be desired, an appeal may be taken, not under the fourth, but under the third clause of the second subdivision of section 565 of the code.

It is said that this court has declared the law to be that the report of a referee has no force or effect until confirmed by the court; that because of these declarations, the report of a referee is nothing at all, does not possess sufficient potentiality to invite attack by motion for a new trial, until acted on and approved by the court; and that section 308 of the old code was amended and given its present form to comply with the declarations of this court. The declarations referred to are the following:

"His [a referee's] report has no force or effect until it is confirmed by the court." (*Kelley v. Schreiber*, 82 Kan. 403, 405, 108 Pac. 816.)

"In general, the findings [of a referee] do not become binding until they have received the approval of the court. (17 Encyc. Pl. & Pr. 1054.)" (*Bank v. Showers*, 65 Kan. 431, 434, 70 Pac. 332.)

The statement contained in the opinion in the Kelley case was not published until May, 1910, and consequently could not have influenced the legislature when it was amending the code at the session of 1909. The statement contained in the bank case was scarcely definite enough to induce the legisla-

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ture to make a special exception with regard to the time for filing motions for new trials in cases tried before referees. If the legislature had intended to render the report of a referee a nonentity until confirmed by the court, it would have amended section 293 of the old code, which gave a report on the whole issue the effect of a decision by the court, and which gave a report on the facts the effect of a special verdict by a jury. Instead of this, the legislature enlarged the power of a referee, conformed the section to the new practice abolishing exceptions, and continued in force the provisions relating to the status and effect of a referee's report (§ 300.) As indicated above, the new section, relating to the time within which a motion for a new trial must be filed (§ 306), does, in apt and succinct terms, apply to the report of a referee, and manifestly the sole object of the amendment was merely to get rid of the necessity of filing the motion for a new trial at the same term of court as the decision.

In this state "repeals by implication" are not favored, and the court ought not to be held to have stricken from the code an important part of an important section by a remark which did not refer to the section, which was inserted in the opinion of the court by way of argument and illustration only, and which was not essential to the decision. The statement made by the writer of the opinion in the bank case cited the authority on which it was based. An examination of the text referred to shows that it was discussing the reports of masters and commissioners in equity cases under chancery practice. The cases cited to sustain the text were all cases of the character indicated. If the writer of the opinion had looked a few pages further in the same textbook, he would have discovered matter relating specifically to referees, and to the subject he was discussing:

"By the statutes of some states the report of a referee upon the whole issue stands as a decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court." (17 Encyc. Pl. & Pr. 1074.)

Standing alone, the statement contained in the opinion in the Kelley case would be too broad, but the most cursory reading of the opinion discloses that the court had no thought of impairing the force of section 300 of the code. The context

makes it perfectly clear that the purpose was to illustrate the distinction between the court and a referee as an organ of the court, whose work the court has power to supervise, modify, approve, or set aside.

It is said that the statute does not provide that the report of a referee shall constitute the judgment of the court, and so make the referee a deputy judge. Certainly not. The report of a referee is merely placed on the footing of the special verdict of a jury, or of findings of fact and conclusions of law stated by the court. It still takes judicial action by the court to bring into existence that distinctive thing which constitutes the final determination of the rights of the parties, the judgment in the case.

When the trial is by the court, and the court states findings of fact and conclusions of law, that constitutes the decision of the court within the meaning of the statute relating to new trials, but not the final judgment. Judgment may or may not be rendered at the time the findings of fact and conclusions of law are returned. So with the report of a referee. When the report comes in, the court does not proceed to reexamine the facts, or tinker with the findings, any more than it would if it had stated the findings itself. The facts are established by the report, which without more stands as the decision of the court on the facts, and judgment may be entered as on a decision made by the court itself in a trial by the court. If a reexamination of the facts be desired, the motion for a new trial must be filed within three days.

The defendant refers to the case of *Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576. In that case the report of the referee was filed on October 14, 1912, and was approved by the court on June 16, 1913. On September 19, 1913, the court directed that a decree be prepared according to the referee's report theretofore made and approved. On March 6, 1914, the court approved a journal entry which recited "that this judgment be and it is hereby made and entered as of September 19, 1913." (p. 179.) The motion for a new trial was filed on March 7, 1914. The defendants, who were appellees, insisted that the motion for a new trial should have been filed within three days after the rendition of judgment on Septem-



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ber 19, 1913. The plaintiff contended that the judgment was not rendered until March 6, 1914. It was sufficient for the purpose of the decision, holding that the motion for a new trial was filed too late, to go back to the decision of the district court approving the referee's report on June 16, 1913.

On March 18, 1916, when the district court denied the motion for a new trial, granted the motion to confirm the report, and rendered judgment, it attempted to follow the practice when a jury is called in an advisory capacity, and "adopted" the report of the referee as the findings and decision of the court. This action of the court was supererogatory. The report of the referee was not an orphan. It stood as the decision of the court by virtue of the statute, and the court could not add anything by adoption proceedings.

• The appeal is dismissed.

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No. 21,602.

THE STATE OF KANSAS, *ex rel.* ROSS MCCORMICK, as County Attorney, etc., *Plaintiff*, v. J. B. FISHBACK, *Defendant*.

SYLLABUS BY THE COURT.

1. *OUSTER—Clerk of City Court—Retaining Fees and Collections—Petition States Cause of Action.* A petition which alleges facts sufficient to show that, under section 3310 of the General Statutes of 1915, it was the legal duty of the clerk of the city court of Wichita to pay into the county treasury certain costs that had been collected by him, and which alleges a willful failure to perform that duty, states a cause of action under section 7603 of the General Statutes of 1915.
2. *SAME—Misunderstanding of Statute—No Defense to Ouster Proceedings.* A misunderstanding of the operation of section 3310 of the General Statutes of 1915 and of chapter 133 of the Laws of 1917, when neither statute is complied with, is not a sufficient excuse on the part of the clerk of the city court of Wichita for his failure to pay to the county treasurer costs that should have been so paid on the first Monday of August, 1917.
3. *SAME—Former Prosecution for Similar Offense—Matters Res Judicata.* A judgment rendered in favor of an officer in an action prosecuted under section 7603 of the General Statutes of 1915 is a bar to any further prosecution under that statute as to all acts that were included in the petition at the time it was filed, but it is not a bar to a prosecution for acts which occurred after the petition was filed, which were not included therein, and which were not passed on in the action.

Original proceeding of ouster. Opinion filed December 8, 1917. Judgment for plaintiff.

*Ross McCormick*, county attorney, *Glenn Porter*, deputy county attorney, and *Thomas E. Elcock*, assistant county attorney, for the plaintiff.

*O. H. Bentley*, and *E. L. Foulke*, both of Wichita, for the defendant.

The opinion of the court was delivered by

MARSHALL, J. : This is an original proceeding in this court, brought under section 7603 of the General Statutes of 1915, to remove the defendant from the office of clerk of the city court of Wichita in Wichita City township in Sedgwick county, for failure to pay over to the county treasurer of Sedgwick county, on the first Monday in August 1917, the sum of \$401.70, costs that should have been paid to the county treasurer on that day, as directed by section 3310 of the General Statutes of 1915.

1. The petition, among other things, alleges—

“That on the 6th of August, the same being the 1st Monday in the month of August, 1917, said J. B. Fishback, as Clerk of the City Court as aforesaid, had in his possession and under his control, or should have had in his possession and under his control, the sum of \$401.70, the same being fees and costs collected by the said J. B. Fishback during the month of July, 1917, and prior thereto in civil and criminal cases in the office of the Clerk of the City Court as aforesaid, and that the same was not fees due witnesses or jurors in said cases; that on the said 6th day of August, the same being the 1st Monday in August, 1917, the said J. B. Fishback had willfully failed, neglected and refused to pay over to the County Treasurer of Sedgwick County, Kansas, the said sum of \$401.70, fees and costs collected by said J. B. Fishback, as aforesaid.

“That said sum of money was collected by the said defendant, J. B. Fishback, during the month of July, 1917, and prior thereto, and that on the said 6th day of August, 1917, it thereupon became the duty enjoined by law on the said J. B. Fishback, to pay over such sum of \$401.70, then in his hands, and held by him as aforesaid, into the county treasury of Sedgwick County, Kansas.”

The defendant demurs to the petition and moves to quash it, to set it aside, and to hold it for naught on the ground that the petition does not state facts sufficient to constitute a cause of action.

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Section 3310 of the General Statutes of 1915 reads:

"In all causes, civil or criminal, brought in said court [the city court of Wichita], there shall be taxed therein the same fees as are allowed by law in such cases before justices of the peace in this state, and when the same are collected they shall be paid by the clerk of said court, on the first Monday in each month, to the county treasurer of Sedgwick county, Kansas, and all such costs and fees shall be collected as is provided by law for the collection of costs in justice courts of this state, and said county treasurer shall credit the same to the county funds, and give duplicate receipts for the same, one of which shall on the same day be deposited with the county clerk by the clerk of said court, together with a detailed statement of the items of costs, the title of the case in which they were paid, and the name of the parties paying the same: *Providing*, That no fees of witnesses or jurors shall be so deposited, but shall be paid by the clerk of said court to the parties to whom they are due."

Section 7603 of the General Statutes of 1915 reads, in part, as follows:

"Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, who shall willfully misconduct himself in office, or who shall willfully neglect to perform any duty enjoined upon such officer by any of the laws of the state of Kansas, . . . shall forfeit his office and shall be ousted from such office in the manner hereinafter provided."

The petition alleges facts sufficient to show a legal duty on the part of the defendant to pay to the county treasurer the money in his hands belonging to Sedgwick county, and also alleges the willful failure of the defendant to perform that duty. The petition states a cause of action. The demurrer is overruled and the motion to quash is denied.

2. As an excuse for his failure to pay the money to the county treasurer on the 6th day of August, the defendant, in substance, alleges that because of a misunderstanding of section 3310 of the General Statutes of 1915 and of chapter 133 of the Laws of 1917, confusion arose concerning the time of making payments to the county treasurer, and, in substance, further alleges that the matters and things of which complaint is made in the petition arose out of that confusion.

Section 3310 of the General Statutes of 1915 requires that the money shall be paid to the county treasurer on the first Monday of each month. Chapter 133 of the Laws of 1917 requires that all money received shall be deposited with the county treas-

urer daily, and that all disbursements shall be made by check on the county treasurer. The evidence discloses that the defendant did not comply with either of these statutes. If all money received had been deposited daily with the county treasurer, when the first Monday of the month came all the money then due the county would be in the hands of the county treasurer, and no shortage could arise. Confusion arising out of a misunderstanding of the operation of these statutes is not an excuse for failure to pay the amount that was due the county on the 6th day of August, 1917.

3. The defendant in his answer sets up, as a bar to the prosecution of this action, a judgment rendered in his favor on July 21, 1917, in an action in the district court of Sedgwick county, which action had been commenced on July 2, 1917, and in which the state of Kansas, on the relation of Ross McCormick, county attorney of Sedgwick county, sought to oust the defendant from the office of clerk of the city court of Wichita. The first petition, filed in that action on July 2, 1917, alleged that there was \$4,080.65 in the hands of the defendant on June 30, 1917, and that the defendant failed to pay that amount to the county treasurer of Sedgwick county as directed by law. The defendant filed a motion to quash that petition, and the plaintiff, on July 13, 1917, filed an amended petition, and, on July 20, 1917, filed another amended petition. In the last amended petition the plaintiff alleged that on June 30, 1917, there was \$4,080.65 in the defendant's hands which had been received and collected from various sources prior to June 30, 1916, and which he failed to pay into the county treasury. The court sustained a motion to quash that amended petition. The plaintiff stood on the petition, and judgment was rendered in favor of the defendant for costs.

The evidence taken by a commissioner appointed by this court shows the following facts:

On the first Monday in August, 1917, \$650.85 was due from the defendant to the county, for costs that had been paid in cases that had been closed before that day. Nothing was then paid by the defendant to the county treasurer. On August 8, 1917, J. H. McPherson, county auditor of Sedgwick county, presented a bill to the defendant for the amount then due the county and asked the defendant for immediate payment. Noth-

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The State, *ex rel.*, v. Fishback.

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ing was paid until August 15, when \$249.15 was paid. In September, \$900.88 additional was paid. Those amounts covered all that was due the county at the time the last payment was made. After the judgment was rendered in the district court, a large number of persons, witnesses and jurors, who had fees in the hands of the defendant, demanded and received payment of the amounts due them. On August 6, 1917, the defendant did not have in his hands enough money to pay the amount then due the county and to pay those to whom fees were due. He obtained from outside sources a part of the money necessary to pay these amounts. The defendant had, to some extent, commingled the funds in his hands as clerk of the city court with his individual money.

There is nothing in the evidence to show that the defendant intended to embezzle any of the money in his hands, but the only conclusion that can be drawn from the evidence is that he did not have sufficient money to pay what was due to the county treasurer and to individuals. Agents, trustees, receivers, guardians, executors and administrators, and public officers must keep the trust money and property in their hands separate and apart from their individual money and property, or abide the consequences.

The judgment in the district court of Sedgwick county is a bar to all matters that were included in the petition in that action, but nothing that occurred after June 30, 1917, was included in that petition or passed on in that action; therefore, that judgment is not a bar to anything that occurred after June 30, 1917.

In the city court, in cases that were closed between June 30 and August 1, 1917, the defendant had received more than \$100 that he should have paid into the county treasury on the 6th day of August. In cases that were closed between July 21, 1917, the day the judgment was rendered in the district court, and August 1, 1917, the defendant had received more than \$45 that should have been paid into the county treasury on the 6th day of August. These amounts were included in the \$401.70, which is made the basis of this action, and which the defendant admits was due on the 6th day of August. These several amounts were included in the demand made on the defendant by the county auditor. The defendant's failure to

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The State, *ex rel.*, v. Fishback.

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make payment on the 6th day of August was not caused by any mistake or confusion brought about by a misunderstanding of the law. From the evidence, the conclusion must be drawn that the failure to make payment was intentional, made so by the fact that the defendant did not have the money with which to make payment, but, whether he had the money or not, payment was enjoined on him by law, and his failure to make that payment subjects him to this proceeding.

When the defendant at the time fixed by law failed to pay the amounts that had been received by him, he was guilty of willful neglect to perform the duty enjoined on him by section 3310 of the General Statutes of 1915.

Under the law, the conclusion is inevitable that the defendant must be removed from the office of clerk of the city court of Wichita City township in Sedgwick county, and it is so ordered.

## JANUARY TERM, 1918.

## PRESENT:

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| HON. WILLIAM A. JOHNSTON, CHIEF JUSTICE. |           |
| HON. ROUSSEAU A. BURCH,                  | }         |
| HON. HENRY F. MASON,                     |           |
| HON. SILAS W. PORTER,                    |           |
| HON. JUDSON S. WEST,                     |           |
| HON. JOHN MARSHALL,                      |           |
| HON. JOHN S. DAWSON,                     | JUSTICES. |

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No. 20,969.

GEORGE B. MURRAY, *Appellee*, v. CHARLES MURRAY et al.,  
(FLORENCE DEMING et al., *Appellants*).

## SYLLABUS BY THE COURT.

1. PARTITION—*Deed by Wife—Husband's Interest in Deceased Wife's Land.* A wife while living with her husband in this state deeded to her children certain land owned by her, the husband not joining. Shortly thereafter the wife died, and fourteen years later the surviving husband brought this action for partition, the land not having been the homestead of either, nor judicially sold, nor necessary for the payment of debts. No application was made by the husband to the probate court for allotment. *Held*, that he is entitled to maintain the action (Gen. Stat. 1915, §§ 3831, 3850.)
2. SAME. The plaintiff's allegation, that the wife was unduly influenced to make the deed, is immaterial, as she could not, whether unduly influenced or not, convey his interest in the land without his consent.
3. SAME—*Husband's Interest in Deceased Wife's Land—Allotment by Probate Court.* By virtue of sections 3831 and 3834 of the General Statutes of 1915 one-half in value of such land vested in the husband in fee simple upon the death of the wife, the allotment provided for in such sections being for the ascertainment merely and not for the vesting of such title.

Appeal from Sherman district court; CHARLES I. SPARKS, judge. Opinion filed January 12, 1918. Affirmed.

C. C. Perdieu, and John Hartzler, both of Goodland, for the appellants.

E. F. Murphy, of Goodland, for the appellee.

The opinion of the court was delivered by

WEST, J.: This case involves a husband's rights in land of his deceased wife, attempted to be conveyed by her alone during their marriage. The court held it subject to partition at the suit of the surviving husband, and the defendants appeal.

In 1906 Sarah Murray owned the land in controversy and made a conveyance thereof without joining her husband, with whom she then lived in Sherman county. She died there intestate during the same year and an administrator of her estate was appointed. In 1914 this action was begun. It is argued that it is barred by the two-year statute of limitations if the deed by the wife was procured by fraud, and by the five-year statute because within that period no application was made to the probate court to allot to the husband his share of the land. But the main defense is that the wife owned the land in her own right, and as it was not the homestead of herself or husband she could convey it without his joining in the deed.

Section 6 of article 15 of the constitution of this state directs the legislature to provide for the protection of the rights of women in acquiring and possessing property separate and apart from the husband. The descents and distributions act (Gen. Stat. 1915, § 3831) provides that one-half in value of all the real estate in which the husband at any time during the marriage had an interest, which has not been sold on execution or other judicial sale and is not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executors as her property in fee simple upon the death of the husband, if she survive him. Section 3833 of the General Statutes of 1915 provides that such allotment may be made by the commissioners within five years after the death of the husband. Section 3850 is as follows:

"All the provisions hereinbefore made in relation to the widow of a deceased husband shall be applicable to the husband of a deceased wife. Each is entitled to the same rights or portion in the estate of the other, and like interests shall in the same manner descend to their respective heirs. The estates of dower and by courtesy are abolished."

It has been difficult to find a name for the interest the wife has in her husband's real estate apart from the homestead. In



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*Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, it was said that it is inchoate and uncertain, but possesses the element of property to such a degree that she could maintain an action during the life of her husband to prevent its wrongful alienation. In *Munger v. Baldrige*, 41 Kan. 236, 243, this interest was said to be a contingent one, but unquestionably property. In *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137, it was spoken of, not as an estate, but as a mere possibility depending upon the death of the husband, or whether he had divested himself of the title prior to his death. In his brief in the case of *Jenkins v. Dewey*, 49 Kan. 49, 30 Pac. 114, the late Mr. Ware suggested as a proper name the "Kansas Marriage Right." In *Nagle v. Tieperman*, 74 Kan. 32, 85 Pac. 941, the interest was declared (page 41) to be quite analogous to that of an heir. It was said (page 43) that section 3831 at most creates an interest in the husband's real estate which attaches, not during his lifetime, but upon his death. In a dissenting opinion, Mr. Justice Greene discussed the nature of this interest and insisted that it is a present property interest, not an estate which ripens into an estate only upon the husband's death. The same Justice in writing the opinion in *McKelvey v. McKelvey*, 75 Kan. 325, 89 Pac. 663, wrote in paragraph two of the syllabus, thus:

"The interest given by statute to a wife in the real estate of her deceased husband is not an inheritance, . . ."

In the opinion it was said:

"The interest which the statute gives to the wife in the real estate of her husband during his life is not easily classified or defined. Because of this difficulty it has been thought by some to be in its nature an inheritance, and such a suggestion may be found in some of the opinions of this court. But practically the entire trend of the decisions of this court is to treat it as a present existing interest—one which the wife may protect by an appropriate action during the life of the husband and against his wrongful acts. (Citing authorities.) The wife's interest does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seizin and the marriage relation." (p. 329.)

Speaking of the provisions of section 3831, touching the setting apart by the probate court, this language was used:

"And the only control exercised by the probate court or the executor or administrator over the wife's interest in the real estate owned by her husband at the time of his death is to ascertain its value and set it apart

to the widow—not as an heir of her deceased husband, but as her separate and absolute property in fee simple. And since this interest does not come to her by inheritance it is not a bar to her recovery that her husband parted with his title in such a fraudulent manner that neither he nor his heirs can recover it.” (p. 329.)

But it is argued by counsel for the defendants with much plausibility and consistency that because section 6160 provides that the property which a woman owns at the time of her marriage, or which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, “shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts,” and because section 6161 provides that she may, during marriage, convey her real property in the same manner and to the same extent as a married man may, the intention of the legislature was to enable the wife to dispose of her real estate by deed, in which instrument it was not intended to be necessary for the husband to join. Their brief says:

“We believe that it was the intention of the makers of our constitution that the wife’s separate property should be absolutely under her control to do with as she pleased.”

But this theory, persuasive as it may be, ignores the requirement of section 3831 to set apart the undisposed-of property to the survivor in fee simple. While it is true that no express language is found in the statute that this shall be inherited by or become the property of such survivor, still the only possible effect to be given to the language used is that whatever portion of the land the survivor may rightfully be allotted comes to him as a fee-simple owner, the allotment manifestly being for the mere ascertainment of its identity and not as a source of title. The title does not come because the allotment is made, but the allotment is made because the title has come. There is nothing in section 6160 or 6161 that really goes counter to this provision, and giving all the various sections relating to the matter their proper significance, it must be held, in accordance with the former rulings in the cases already mentioned, that the plaintiff is entitled to maintain his action to have partitioned to him his part of the land formerly owned by his deceased wife, in the conveyance of which he did not join.

While he alleges in his petition that she was unduly influenced to make the deed, that is not material, for she could not

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by such conveyance, whether unduly influenced or not, deprive her surviving husband of his fee-simple interest in the land in question.

It follows, therefore, that the judgment must be affirmed.

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No. 20,970.

ALBERT ZUSPANN and R. B. ZUSPANN, *Appellants*, v. MOSES A. ROY and ELIZABETH E. ROY, *Appellees*.

SYLLABUS BY THE COURT.

1. **DEED—Breach of Warranty against Encumbrances—Mutual Mistake in Deed—Presumptions—Instructions.** In an action for damages caused by a breach of a warranty against encumbrances, contained in a warranty deed, where the defense is that the deed does not express the contract of the parties, that the warranty against encumbrances was inserted in the deed by the mutual mistake of the parties thereto, and that the contract was that the grantee in the deed should assume and pay the encumbrances, it is not error for the court to instruct the jury that the deed is presumed to contain the whole of the contract, but that this presumption may be overcome by evidence which incontrovertibly establishes that a covenant to assume and pay the encumbrances was omitted by mistake, and that the mistake was the mutual mistake of both the parties to the deed.
2. **SAME—Instructions.** In such an action, it is not prejudicial error for the court to fail to instruct the jury that the execution of the deed and the existence of the encumbrances are admitted, where it conclusively appears that neither of these facts was questioned during the trial.
3. **SAME—Deed—Mutual Mistake May be Shown.** A mutual mistake in a deed conveying real property may be shown, although the parties thereto did not, before it was signed, carefully examine it to ascertain whether it expressed their agreement.
4. **SAME—Mutual Mistake Defined.** A mutual mistake in a written contract is one that is made by all the parties thereto.
5. **TRIAL—Instructions Construed as a Whole.** If instructions, where considered together, do not appear to be erroneous, a judgment based thereon will not be reversed.

Appeal from Sherman district court; CHARLES I. SPARKS, judge. Opinion filed January 12, 1918. Affirmed.

*John Hartzler*, of Goodland, for the appellants.

*E. F. Murphy*, of Goodland, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: In this action the plaintiffs seek to recover judgment for damages caused by the breach of a warranty against encumbrances, and for damages caused by false and fraudulent representations made concerning a well on real property received by the plaintiffs in exchange for other property conveyed by them to the defendants. Judgment was rendered in favor of the defendants, and the plaintiffs appeal.

The petition alleged that the plaintiffs exchanged land in Barry county, Missouri, with the defendants, for real property in Sherman county, Kansas. The petition set out two causes of action. In the first cause of action, the petition alleged that included in the real property in Sherman county were three lots with a house thereon in Goodland; that the defendants, in the deed conveying the Sherman county real property to the plaintiffs, warranted that the premises were free and clear of encumbrances; that the lots in Goodland were encumbered by a mortgage to secure the payment of \$500 and interest; that the plaintiffs, to protect their title to the lots, were compelled to purchase the note and mortgage; and that they were damaged in the sum of \$558. In the second cause of action, the petition alleged that a certain half section of real property conveyed to the plaintiffs was improved; that—

“The plaintiff, Albert Zuspann, made an examination of such premises in company with defendant, Moses A. Roy; that at such time such defendant represented, pointing to a well and windmill tower on such premises, that if a wheel was placed on such tower, and connection made with the pump that was all that was needed and that the well would furnish ample and sufficient water for all ordinary purposes on such farm;”

that these representations were false; that the plaintiffs believed them to be true and relied on them; and that they were thereby induced to make the exchange of lands.

The material parts of the answer were a general denial and allegations that the real property owned and exchanged by the plaintiffs was encumbered by mortgages; that a part of the real property owned and exchanged by the defendants was likewise encumbered by mortgages; that the lots in Goodland were encumbered by a mortgage for \$500; that it had been agreed that each of the parties would assume and pay the encum-

branches on the real property received by him in the exchange; that the deed from the defendants to the plaintiffs did not describe nor mention the mortgages on the Sherman county land; and that—

“By oversight, error, mistake and omission the reservations as to encumbrances on that part of said real property as was at the time encumbered by mortgage were left out of said deed, but that said plaintiffs, their agents and persons acting for them at all times understood that said lands were to be conveyed subject to said encumbrances and all of them.”

1. The sixth instruction to the jury was as follows :

“You are further instructed that it is the presumption of law that the deed for the lots hereinbefore referred to contained the agreement of the parties thereto concerning said conveyance and all of the agreement. This presumption may be overcome by the party asserting that the deed does not contain all of the agreement but the burden of proving such is upon the party making such assertion. So in this case the evidence must establish incontrovertibly that the mistake alleged was common to both parties, in other words, that both parties understood the contract as it is alleged it ought to have been expressed and as in fact it was but for the mistake alleged in reducing it to writing and the failure to insert the reservation as to the assumption of the mortgage.”

Two complaints are made of this instruction. One is of the first two sentences of the instruction; the other is of the last sentence. The instruction cannot be properly divided. Each part of the instruction is dependent on the other part for its meaning. This court has often said that an instruction, or rather all of the instructions, must be construed as a whole. (*Madey v. Swift & Co.*, 101 Kan. 771, 168 Pac. 1105; *Murphy v. Gas & Oil Co.*, 96 Kan. 321, 325, 150 Pac. 581.)

An opinion in an action very similar to the one now under consideration is found in *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980, where this court said :

“Where the grantee of a deed enters into an agreement with the grantor that he will assume and pay all of the mortgages and incumbrances on the land conveyed at the time of the execution of the deed, but by the mutual mistake of the parties the deed in its written form does not express this contract, equity has jurisdiction to reform the written instrument so as to conform to the intention, agreement and understanding of the parties.” (Syl. ¶ 1.)

There was no error in the instruction.

2. One of the instructions requested by the plaintiffs and refused by the court contained the following language :

"The defendants admit the execution of such deed and admit that such lots were so encumbered by such mortgage, but allege that they executed such deed by mistake believing that such deed excepted such incumbrance of five hundred dollars and interest."

The court did not instruct the jury that the execution of the deed was admitted nor that the lots in Goodland were encumbered, but from the abstract it appears that neither of these facts was questioned during the trial; therefore no prejudicial error resulted from the court's not instructing the jury concerning the admission of these facts. The court did instruct the jury concerning the mistake in the deed. There was no error in not giving this instruction as requested.

3. The plaintiffs complain of the refusal of the court to instruct the jury concerning the negligence of the defendants in signing a deed that did not express the contract of the parties. If the defendants had read the deed signed by them and had understood it, they would have known that the plaintiffs did not therein assume nor agree to pay the mortgage on the lots in Goodland. The same thing may be said of every written contract which, by mistake, contains or omits to contain provisions on which the parties have agreed, and which they intend shall be embraced in the contract. In *Stephenson v. Elliott*, supra, the mistake could have been discovered and avoided if the parties had diligently examined the written contract before they signed it.

It was not error for the court to refuse to give these instructions.

4. The plaintiffs contend that "the verdict is contrary to the evidence in regard to the mistake being mutual." The answer to this contention is that the evidence shows that the contract between the plaintiffs and the defendants was contained in letters, which specifically stated that each party was to assume and pay the mortgages on the real estate received by him in the exchange; that by a mistake made by some person connected with the transaction the deed from the defendants to the plaintiffs failed to recite that the plaintiffs assumed and agreed to pay the mortgage on the lots in Goodland; and that the deed should have so recited. Whose was the mistake? It was the mistake of all the parties connected with the preparation of the deed. This contention of the plaintiffs is without merit.

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Zuspann v. Roy.

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5. The plaintiffs complain of another instruction given to the jury; that instruction was as follows:

"You are instructed that when one represents that a certain well is a good well or that it will supply plenty of water, without stating the amount, would be a mere expression of opinion on the part of the person making said statement, and would constitute no ground for the allowance of damages in case the same were untrue."

This instruction must be considered with two other instructions that were given. They were as follows:

"The plaintiff in this case for one of his causes of action claims that the defendant herein made certain representations to him regarding a certain well located upon a portion of the real estate conveyed to plaintiff herein by the defendant herein in the trade or exchange of lands referred to in the testimony. Before the plaintiff is entitled to recover for any damages for any representations made by the defendants to plaintiff concerning said well, you must find that the defendant knew said representations to be false, or at least he must have made them without reasonable grounds for believing them to be true. The representations must be of such a character as are likely to deceive the purchaser, or must be made with intent to deceive him. The representations must be relied on and must be taken as true by the purchaser or one receiving land in exchange to such an extent as that, if they had not been made, he would not have made the purchase or exchange. •

"You are further instructed that if you find the plaintiff is entitled to recover upon his second cause of action herein, the measure of damages which he would be entitled to would be the amount that it would take to put the well, in controversy, in the condition that it was represented to the plaintiff to be in by the defendant, if such representations were so made, or in case it could not be so repaired then and in such a case the reasonable cost of drilling and making a new well in the same vicinity of the old well and similar to what the old well was represented to be, if any representations were made concerning the old well, but in any event your verdict on the cause of action cannot exceed the sum of \$150."

When these instructions are read together, there does not appear to be any error in any of them. By these instructions the issue of fraud was submitted to the jury, and the jury, on conflicting evidence, found there was no fraud.

The judgment is affirmed.

No. 20,971.

JOHN N. EAGAN and BERT DONAHEY, *Appellees*, v. PERCY  
MURRAY and EMERY L. MOORE, *Appellants*.

## SYLLABUS BY THE COURT.

1. **SALE OF JACK—Breach of Warranty—Petition States Cause of Action.** Ordinarily, a petition which narrates several distinct breaches of a valid contract states a cause of action with sufficient precision against the party who breached the contract, although the prayer may be for alternative relief, and a cause of action so pleaded is good against a demurrer.
2. **SAME—Breach of Warranty—Petition—Prayer for Relief.** The prayer of a petition is merely the pleader's idea of the relief to which he is entitled; it is not a part of the statement of the cause of action; and if the cause of action is sufficiently stated and sufficiently proved, the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part to the relief prayed for by the pleader.
3. **SAME—Breach of Warranty—Burden of Proof.** Where a vendor sells a chattel to a vendee upon a warranty that the chattel will measure up to a certain standard of usefulness, and agrees to accept a return of the chattel if it fails in the matters covered by the warranty, and where the facts touching the alleged failure under the warranty are within the knowledge of the vendee, or readily ascertainable by him, and not within the knowledge of the vendor, nor readily accessible to him, it is proper for the court to impose on the vendee the burden of showing that the chattel did not measure up to the warranty.
4. **SAME—No Prejudicial Error in Record.** Errors assigned on instructions, incompetency of evidence, and its insufficiency to sustain a verdict, examined, and not sustained.

Appeal from Sherman district court; CHARLES I. SPARKS, judge. Opinion filed January 12, 1918. Affirmed.

John Hartzler, and C. C. Perdieu, both of Goodland, for the appellants.

E. F. Murphy, of Goodland, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: The plaintiffs recovered judgment against the defendants on a promissory note for \$300, given in payment for a breeding jack which plaintiffs had sold to the defendant upon a warranty that it would beget forty per cent of foals,



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Egan v. Murray.

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and upon an agreement to take back the animal if his breeding record did not fulfill the warranty. The contract of sale was referred to in the promissory note, and a copy of the contract was attached to plaintiffs' petition. The contract also provided that in case of a return of the animal, the defendants were to turn over the breeding accounts to the plaintiffs, and to return the animal in good condition. The petition alleged default of payment of the note and—

"That at all times since the execution and delivery of said note, the said defendants and each of them have at all times failed, neglected and refused and still refuse to either pay said note, or to deliver said jack, or turn over said accounts to the plaintiffs, or either of them."

The prayer was for judgment on the note, or for a return of the jack and for a delivery of the breeding accounts according to the contract.

Defendants' demurrer to plaintiffs' petition was overruled, and they answered, alleging that the jack did not beget the guaranteed percentage of foals; that the plaintiffs accepted a return of the animal; and that copies of the breeding accounts were delivered to plaintiffs. The plaintiffs' reply denied the matters pleaded in defendants' answer.

The cause was tried to a jury and a general verdict for plaintiffs was rendered.

Defendants assign error, (1) in overruling the demurrer to plaintiffs' petition; (2) in the instructions; (3) in admission of incompetent evidence; and (4) that verdict was contrary to the evidence.

Touching the particular point raised by the demurrer, defendants contend that if the petition stated any cause of action it was based upon two conflicting theories:

"First—One theory is the enforcement of the contract and recovery of consideration for the jack.

"Second—The rescission of the contract and recovery of the jack and accounts."

Neither conflict nor inconsistency appears. The petition pleaded all the pertinent facts—the execution of the note, the contract of sale, the default of payment, the failure to return the animal and to turn over the accounts. Surely such a petition was good as against a demurrer. (*The State, ex rel., v. Gerhards*, 99 Kan. 462, 464, 162 Pac. 1149.) The petition stated a cause of action upon a single definite theory—plain-

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- Eagan v. Murray.

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tiffs' right to recover on account of these several defaults—and such a pleading violated no rule laid down in *Grentner v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619, nor any other rule of good pleading. Plaintiffs' action was founded on breach of contract. The right to a return of the jack and a delivery of the accounts was pursuant to the contract, and did not rest on the legal principles governing the return of property when a contract is rescinded. No legal question of rescission is involved in this case. It was sufficient for the petition to state defendants' several defaults, and the prayer for alternative relief was also proper. So long as a petition states a good cause of action, the prayer for relief is not very important. The prayer merely voices the plaintiffs' idea of what relief he is legally entitled to, or what redress will satisfy him. The court will grant him the relief to which his cause of action alleged and proved shows him to be entitled, and this relief may or may not conform in whole or in part to that prayed for by the plaintiff. (*Smith v. Kimball*, 36 Kan. 474, 493, 13 Pac. 801; *Walker v. Fleming*, 37 Kan. 171, syl. ¶ 2, 14 Pac. 470; *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56; *Hardy v. LaDow*, 72 Kan. 174, 83 Pac. 401; *Railway Co. v. Murphy*, 75 Kan. 707, 90 Pac. 290; *Nesbitt v. Chesebro*, 89 Kan. 863, 868, 133 Pac. 545; 31 Cyc. 110, 111.)

Complaint is made of an instruction which imposed on defendants the burden of proving the percentage of foals begotten by the jack. This was a proper instruction. This fact was peculiarly within the knowledge of defendants. It was for them to know and to show that fact. The plaintiffs had no practical means of ascertaining the number of foals. Moreover, the defendants were not to be relieved of payment by a mere failure in the number of foals. The note was to be paid, notwithstanding such failure, unless the jack was returned in good condition together with the breeding accounts. This feature of the case was also clearly and fairly defined by the court's instructions.

Defendants complain because a witness was permitted to testify that the jack was not in a good condition, and that he was thin and lame about the time he should have been returned pursuant to the contract if his breeding record was not up to the guaranty. If the jack had been returned as the contract

provided, his condition would have been important and the evidence would have been competent. Since there was no return of the jack, the evidence complained of was perhaps irrelevant and immaterial; but the judgment did not in any respect rest upon the evidence of the donkey's condition, and it did not prejudice the defendants.

A final contention of defendants is that the verdict was contrary to the evidence. Let us see. It was admitted that the note was not paid. It was shown that the jack was not returned, but in some way had fallen into the possession of the father of the defendant, Emery L. Moore. While copies of the book accounts were furnished to plaintiffs, the original book of accounts was withheld by the father of Moore and the accuracy of the copies was not established. Elsewhere it was shown that defendant Moore said that he had sold his interest in the jack to his father and could not return it. It is true that defendants adduced some evidence tending to show that there was a return of the jack; that one of plaintiffs said, "We have taken the jack back," and that the jack was left temporarily with Moore's father because plaintiffs had no place to keep it; yet this conflict of evidence was for the jury to unravel, and the familiar rule governing a jury's findings in such a state of the evidence controls. (*Wideman v. Faivre*, 100 Kan. 102, 163 Pac. 619; *Bruington v. Wagoner*, 100 Kan. 439, 164 Pac. 1057.) The record clearly discloses substantial evidence to support the finding and judgment.

No prejudicial error can be discerned in this record, and the judgment is affirmed.

No. 20,972.

LAURA L. HODGEN and C. W. HODGEN, *Appellants*, v. M. A. ROY  
and ELIZABETH E. ROY, *Appellees*, et al.

## SYLLABUS BY THE COURT.

1. *ATTACHMENT—Land—Defective Return of Sheriff—Return Not Void.* In his return upon an order of attachment the sheriff should describe the property attached so that it can be readily identified; and held, that the return herein which described the land seized as the northeast and northwest quarters of section 22, in township 7, range 38, is not void by reason of indefiniteness or uncertainty in the description.
2. *ATTACHMENT — Mortgage Foreclosure — Concurrent Remedies.* A party may employ as many concurrent and consistent remedies as the law gives him, and a plaintiff in an action to recover an indebtedness and to foreclose a mortgage given to secure its payment may secure the issuance of an order of attachment and the levy of the same upon property other than that included in the mortgage.
3. *SAME—Mortgage Foreclosure—Excessive Levy—Levy Not Void.* A court has authority to protect the defendants or other creditors as against an excessive levy and the seizure and holding of more property than is necessary to meet the judgment establishing the indebtedness; but the fact that an officer seizes and holds an excessive amount of property does not necessarily invalidate the attachment.

Appeal from Sherman district court; CHARLES I. SPARKS, judge. Opinion filed January 12, 1918. Reversed.

*John Hartzler*, of Goodland, for the appellants.

*E. F. Murphy*, of Goodland, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: The validity of an attachment of real estate is involved in this appeal.

The plaintiffs brought an action in the district court of Sherman county to foreclose a mortgage on real estate, and in their petition alleged that the mortgage on the land was insufficient to secure the payment of the mortgage debt. They therefore procured the issuance of an order of attachment and caused it to be levied on property other than the mortgaged land. The order was directed to the sheriff of Sherman county, who levied it upon a tract of land, and in his return

stated that the land attached by him was described in an appraisal which he procured to be made and which was made a part of his return. In the appraisal the land was described as the northeast and northwest quarters of section 22, in township 7, range 38. He also returned that he had posted copies of the notice on land of the same description. In neither was the meridian mentioned nor did he state that it was situated in Sherman county.

Defendants challenged the validity of the attachment by motion on the ground that the return of the sheriff failed to show that the land attached was in Sherman county and within the jurisdiction of the court. While the description is incomplete, no one could be misled as to the identity of the land. There is no section 22, in township 7, range 38, in Kansas, other than the tract levied on by the sheriff. The order was issued to the sheriff of Sherman county, in an action that could only be brought in that county, and he could not levy the attachment in any other county. The appraisal which was included in his return was made by householders of Sherman county. It was of course the duty of the sheriff in making his return to describe the property attached so that it could be readily identified. We think the description given in the return accomplished that purpose. Defendants contend that the exactness of description required in a deed is essential to the validity of a return. In view of the fact that the return is only a step taken towards giving the court jurisdiction to establish a claim and appropriate property for its payment, and one which is still open to contest and to amendment, it is hardly necessary that there should be the same precision of description as in an instrument which transfers title of land. It has been said:

"While there is respectable authority to the effect that the description should be as specific as that required in a deed, and while such a description would no doubt in all cases be sufficient, yet, inasmuch as the object of the attachment is to secure the jurisdiction of the court over the land until plaintiff establishes his claim, it would seem that the same certainty ought not to be required as when the title is divested." (4 Cyc. 611.)

If there was anything lacking in the description of the land attached the defendants supplied it in their motion attacking the sufficiency of the attachment. In it they state that the land

levied upon under the order of attachment was the north one-half of section 22, in township 7 south, of range 38 west of the sixth principal meridian, in Sherman county, Kansas. No fuller or better description of the land could be made than that given in this admission of the defendants.

It is also contended that a party who has brought an action to foreclose a mortgage, as the plaintiffs did, cannot procure the attachment of other property of the defendant until the mortgage security has been exhausted. A party may employ as many remedies as the law gives him, providing they are not inconsistent with each other. He may sue on the debt alone, and may obtain an attachment or other proceeding authorized by law to establish his debt or to secure or enforce its payment, or he may foreclose the mortgage and subject the mortgaged property to the payment of the debt. The mere fact that he has asked for a foreclosure does not preclude the use of other concurrent and consistent remedies. (*Schuler v. Fowler*, 63 Kan. 98, 64 Pac. 1035; Note, 73 Am. St. Rep. 559. See, also, *Lichty v. McMartin*, 11 Kan. 565.)

If the mortgaged property is insufficient to secure the payment of the debt, there is no reason why the creditor may not, if grounds of attachment exist, procure the attachment of property, not included in his mortgage, sufficient to meet the indebtedness. A court has authority to protect a defendant as well as other creditors by preventing an excessive levy or the holding of more property than is sufficient to meet the debt with the necessary costs and expenses. (4 Cyc. 599.) The fact that the officer seizes and holds a larger amount of property than is necessary does not necessarily invalidate the attachment. (*Tucker v. Green*, 27 Kan. 355; 6 C. J. 238.) It was alleged here that the mortgaged premises were insufficient to secure the payment of the amount due on the note, and nothing appears to show that the seizure of the additional property was excessive.

It follows that the decision of the trial court holding the attachment to be invalid must be reversed, and the cause remanded for further proceedings.

No. 21,017.

CHARLES CARTER, *Appellant*, v. GEORGE WILSON (and J. D. McCARTER, *Appellee*).

## SYLLABUS BY THE COURT.

1. *NOTE—Conditional Promise to Pay—Condition Impossible of Performance—Liability.* Whenever subsequent impossibility of meeting the conditions of a contract might readily have been foreseen by the party obligated to perform, he will not be excused from performance on the ground of impossibility.
2. *SAME.* The maker of a note for the debt of another executed it on condition that he was to pay the portion of the debt which a sale of chattel security lacked of paying, and was to be responsible for that difference only. After default of the principal debtor the creditor discovered that the chattel mortgage was void, and that no sale could be made under it, because the property was exempt and the mortgagor's wife had not joined in executing the instrument. No sale was attempted, and the creditor undertook to recover on the note. *Held*, the principle stated in paragraph 1 applies, and the maker is not liable because the condition of his liability has not been performed.

Appeal from Ford district court; LITTLETON M. DAY, judge.  
Opinion filed January 12, 1918. Affirmed.

*George A. Neeley*, of Hutchinson, and *Walter L. Bullock*, of Dodge City, for the appellant.

*J. M. Kirkpatrick*, of Dodge City, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one to recover on a promissory note. The answer was that the note was given on condition, and the condition had not been performed. Judgment was rendered for the defendant, and the plaintiff appeals.

George Wilson obtained from the plaintiff a loan of money, giving therefor his promissory note, secured by chattel mortgage on a threshing engine. When Wilson applied for the loan the plaintiff expressed dissatisfaction with the security offered. The defendant gave his opinion of the value of the engine, and agreed to sign the note on condition he was to pay the portion of the debt which a sale of the engine lacked of paying, and was to be responsible for that difference only. On these terms he

signed the note. The debt was not paid when it matured, and the plaintiff took possession of the engine under the chattel mortgage. He then discovered the engine was exempt property, and the mortgage was void because Wilson's wife had not joined in its execution. The plaintiff returned the engine to Wilson without attempting to sell it. The defendant had a purchaser for the engine who would have paid \$1,000 for it.

The answer was met by a reply. No objection was made to the evidence offered in support of the answer. The court found the essential facts, and the findings are not challenged. This court cannot consider matters which were not presented to the district court for decision, and the only question to be determined is whether or not the findings sustain the judgment.

The plaintiff says that performance by him of the act upon which the defendant's liability was conditioned was impossible, because the chattel mortgage was void and no sale of the engine could be made under it. The plaintiff took such chattel mortgage as he desired, and he cannot charge the consequences upon the defendant because he failed to procure a valid one. The engine belonged to a class of property likely to be exempt, and if exempt a chattel mortgage not executed by husband and wife jointly would be void. The contingency was one which a man of ordinary prudence should have foreseen and guarded against. The defendant did not contract to pay the note absolutely. He merely contracted to pay whatever balance should remain after deducting the proceeds derived from a sale of the engine. The contract was not illegal or immoral. The sale of personal property under chattel mortgage is by no means impossible under the laws of this state, and it is elementary that whenever subsequent impossibility of meeting a condition might readily have been foreseen by the party who must perform, he is not excused.

The judgment of the district court is affirmed.



No. 21,121.

THE GATE CITY NATIONAL BANK, *Appellant*, v. M. L. GREENE and J. Q. GREENE, *Defendants* (C. R. HEPLER, Interpleader, *Appellee*).

## SYLLABUS BY THE COURT.

1. ATTACHMENT—*Bill of Sale—Securing Attorney's Fees—Transaction Not Fraudulent as to Creditors.* A debtor while solvent employed attorneys to defend her sons in criminal actions pending against them. She gave her note to one of the attorneys for their fees and for expenses incident to the defense of the actions, and secured the note by a mortgage on real estate. The mortgage was not sufficient security for the note, and she procured her daughter and her daughter's husband to assume payment of the attorney fees. To the daughter she assigned an interest in an estate, and to her daughter's husband she gave a bill of sale of personal property. The entire transaction was conducted in good faith, and not for the purpose of hindering, delaying, or defrauding creditors. Soon afterward the debtor was adjudged to be bankrupt. In an action by a creditor the personal property covered by the bill of sale was attached. *Held*, the instrument was not, in law, fraudulent as to creditors.
2. SAME—*Bill of Sale—Security for Future Advances—Not Fraudulent.* Besides the consideration stated, the bill of sale was given for indefinite future outlays of money for the benefit of the debtor and for her support until her finances mended. *Held*, the inclusion of future advances did not, of necessity, render the bill of sale fraudulent.
3. SAME—*Note and Mortgage—Securing Attorney's Fees—Good Faith Required.* The need for the employment of the attorneys was instant, and they were employed to represent defendants in specified criminal actions pending at the time. *Held*, the attorneys could take and hold security for their fees, given in good faith and not as a ruse to hinder, delay, or defraud.
4. SAME—*Finding Sustained by Evidence.* The proceedings examined, and held, the general finding of the court on the issues of solvency, fraudulent intent, and others, was sustained by the evidence.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed January 12, 1918. Affirmed.

J. L. Shelden, of Ottawa, M. L. Friedman, and I. J. Ringolsky, both of Kansas City, Mo., for the appellant.

Wilbur S. Jenks, of Ottawa, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one to recover on a promissory note for \$10,000, given by the defendant, Mrs. M. L. Greene, whose liability was not contested. An attachment was levied on certain chattels as the property of the defendant. Dr. C. R. Hepler intervened, claiming the chattels under a bill of sale from the defendant. The question was whether or not the bill of sale was made to defraud creditors. The court sustained the bill of sale, and the plaintiff appeals.

Mrs. Greene incurred liability to the plaintiff to assist two sons, who were engaged in the banking business in Pueblo, Colo. To protect her they gave her title, or the means of procuring title, to various tracts of land in Colorado, New Mexico and Michigan. At that time the defendant owned a widow's portion of a farm in Franklin county, Kansas, a one-half interest in some stock and implements on the farm, and a one-sixth interest in an estate in Illinois. The sons failed, and a number of indictments were returned against them for violations of the federal banking laws. Some difficulty was experienced in procuring bonds and in procuring desired counsel. The mother came to the relief of her sons, and called to her assistance the interpleader, Dr. Hepler, who was her son-in-law. Dr. Hepler is a physician who formerly resided at Manhattan, and held a position in the state hospital at Osawatomie. He had gone to Colorado to look after a sick brother, and became connected with the management and disposition of real estate in which the Greenses were interested. Two attorneys were employed to defend in the district court the criminal actions pending against the sons. The fees of the attorneys were \$5,000 and \$2,000, respectively, and they required \$1,000 for expense money incident to the litigation. Mrs. Greene signed a note for \$8,000 for these fees and expenses, and secured it by mortgage on the Franklin county farm. Doctor and Mrs. Hepler, at Mrs. Greene's request, signed obligations to the attorneys for their fees. Mrs. Greene gave Dr. Hepler a bill of sale of her interest in the stock and implements on the farm, and she gave Mrs. Hepler an assignment of her interest in the Illinois estate. The consideration of the bill of

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sale and assignment was to reimburse Dr. Hepler for outlays of money in the crisis in the Greene affairs, to protect Dr. and Mrs. Hepler on their obligations to pay attorney fees, and to help support Mrs. Greene until she should be able to take care of herself. Previous to this transaction Mrs. Greene had transferred to Dr. Hepler some ranch properties in Colorado, not shown by the evidence to be of any value above the mortgages on them. Through a trade of some of the lands received from her sons, Mrs. Greene became the owner of an apartment house in Pueblo, Colo., known as Marlborough Terrace, which was subject to a first mortgage of \$3,500. A note secured by a second mortgage for \$6,000 on the property came into Mrs. Greene's hands, which she transferred to the plaintiff as additional security for her obligation to the plaintiff. The transaction which included the mortgage to the attorneys, the bill of sale, and the assignment of the estate in Illinois, covered the time from January 27 to February 1, 1914. In September of the same year Mrs. Greene was adjudged bankrupt.

The district court made a general finding in favor of the interpleader. This finding includes, of course, findings on all the material issues. The plaintiff contends that the bill of sale was given with intent to defraud, that Mrs. Greene was insolvent at the time she made the bill of sale, and that the consideration for the bill of sale was of a character to render it fraudulent.

The finding of the district court that Mrs. Greene entertained no actual intention to hinder, delay or defraud her creditors, is approved. The conclusion to be drawn from the evidence is that the security which the sons gave Mrs. Greene when she executed for their benefit the \$10,000 note sued on was chiefly, if not entirely, trading property of speculative value. There is no evidence that she possessed the necessary skill and ability to handle such property successfully. Marlborough Terrace was practically all she realized from it, of any value. Concerning the tracts of land turned over to Dr. Hepler before the transaction of January 27, 1914, she said: "I am an old woman, and I wanted to get these things off my hands." When her sons were indicted and incarcerated she

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undertook to do what any American mother would have done, and she was obliged to ask assistance. She said:

"I made the bill of sale to Dr. Hepler on the 27th day of January because he had signed obligations for me, and I was alone in the world and I had these cases of the boys to look after, my husband is dead, and I had no one when my boys were in trouble but Dr. Hepler and I appealed to him, and I had to compensate him in some way, and I gave him a bill of sale to compensate him for going on my obligations.

"Q. What obligations do you refer to? A. I refer to attorneys' fees and expenses of this trial pending against my boys."

Besides this, she said she had to live, and that Dr. Hepler could not go on her obligations and protect her without some compensation. The assignment of her interest in the estate in Illinois was made to her daughter on the same consideration. She believed the plaintiff was amply secured, and there is nothing to indicate that she had any intention whatever of wronging either of her other creditors, a bank in Ottawa and a Mr. Wilson, of Illinois. There is evidence that all parties to the transaction of January, 1914, believed Mrs. Greene was solvent. The plaintiff was the only creditor that had been preferred. Other creditors had not asked for security, and the plaintiff's president had expressed satisfaction with his security when Mrs. Greene assigned the mortgage for \$6,000 on Marlborough Terrace. The plaintiff does not strongly impute evil-mindedness to Mrs. Greene in coping with her difficulties, and the real question in the case is whether or not the bill of sale was fraudulent in law.

The finding of the district court that Mrs. Greene was solvent when the bill of sale was made is approved.

**Her assets were:**

|   |          |
|---|----------|
| Franklin county farm (above mortgage).....      | \$5,580  |
| Estate in Illinois.....                         | 3,000    |
| Property covered by bill of sale.....           | 1,368    |
| Marlborough Terrace (above first mortgage)..... | 6,000    |
|   | <hr/>    |
|   | \$15,898 |

**Her liabilities were:**

|                        |          |         |
|------------------------|----------|---------|
| To plaintiff.....      | \$10,000 |         |
| To Bank of Ottawa..... | 1,880    |         |
| To Mr. Wilson.....     | 1,000    | 12,880  |
|                        | <hr/>    |         |
|                        |          | \$3,018 |

The court has little time to discuss evidence, and little space in the Kansas reports for the publication of discussions of

evidence. It may be remarked, however, that the value assigned to the farm is derived from oral testimony on which presumably the district court relied. The value assigned to Marlborough Terrace is based on the testimony of Mrs. Greene, as to the character of the property, its location and surroundings, and its present state of repair and rental value; the testimony of B. J. Parker, who was agent for the property for eight years, during which time it produced a revenue of \$100 per month, or twelve per cent per annum on \$10,000; and the testimony of O. G. Smith, who examined the property for the purpose of making a loan on it about the time the bill of sale was given. The evidence on which the plaintiff lays great stress—the value of the \$6,000 mortgage—is of slight importance in the presence of evidence of the value of the real estate. Second mortgages on real estate and real estate itself are very different things on the market. The distinction is made clear in the testimony of Smith. One of the plaintiff's witnesses was so pessimistic that he testified there was hardly any market value of property in Pueblo. The plaintiff's other witness, while testifying that the second mortgage of \$6,000 had no particular value, said that the real estate had an actual cash market value of \$7,000—double the amount of the first mortgage. An analysis of the testimony of Parker, contained in the plaintiff's reply brief, does not fairly represent him.

The finding of the district court that the bill of sale was not voluntary, but was based on a valuable consideration, is approved. Whether providently or improvidently, Mrs. Greene became obligated to the attorneys whom she employed, on a note and mortgage, and liability on this obligation cannot be gainsaid. While the assistance which she rendered her sons was voluntary, her obligation to the attorneys was not voluntary, because it was based on a valuable consideration, the adequacy of which is not in dispute. It is said, however, that the law will regard the note and mortgage as fraudulent, because not given for a present consideration. Cases are cited in which transfers of property made in consideration of the rendition of future services were condemned. It is not necessary to review them. In this instance the employment was not a general employment to render whatever legal services might be required, in whatever litigation might arise in the

future, as in the case of *Shellabarger v. Mottin*, 47 Kan. 451, 454, 28 Pac. 199, or to render such services as the client and his relatives might need within the next two years, as in the case of *National Bank v. Croco*, 46 Kan. 629, 26 Pac. 942. The employment was to defend specific criminal actions pending at the time in a specific court. The need for the employment was instant, and for all the purposes of the law the services were due at once. The employer was not insolvent. She was not prohibited from making new engagements, and the attorneys simply became Mrs. Greene's creditors. They became creditors of equal rank with the plaintiff, and could take and hold security for their claim, if given in good faith and not as a ruse to hinder, delay, or defraud other creditors.

The mortgage to the attorneys was not sufficient to secure payment of the note. Sureties were required. Dr. and Mrs. Hepler assumed \$7,000 of the amount, and so became bound to the attorneys by an obligation, subject to no defense disclosed by this record. To compensate them the bill of sale and assignment were given. The consideration was a valuable one, which arose at the time of the transaction, and consequently the instruments were not voluntary, under any rational interpretation of the statute of frauds. (Gen. Stat. 1915, § 4885.)

In the case of *Smith v. Rankin*, 45 Kan. 176, 25 Pac. 586, a principal transferred property to his surety. The surety received the property not simply as indemnity, but as consideration for his promise, made at the time of the transfer, to pay the principal's debt. The transfer was upheld when assailed as fraudulent by attaching creditors.

It is said the fact that the bill of sale was given in part for future advances rendered it a hindrance to creditors and a fraud on their rights. The evidence does not establish any definite sum of money which Dr. Hepler had advanced on Mrs. Greene's account before the bill of sale was executed. Afterwards he said he advanced from \$500 to \$700. Treating the bill of sale as intended to cover future advances by way of expenses and by way of Mrs. Greene's support, it was not necessarily fraudulent. Such a transaction is open to explanation, and if the purpose were not to cover up property with a pretended claim, in order to hinder, delay, or defraud creditors, it will be sustained to the extent that it was supported by

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an existing consideration. (*Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961; *Farlin v. Sook*, 30 Kan. 401, 1 Pac. 123.) The security was not so excessive as to cast suspicion on the transaction. (*Clement v. Hartzell*, supra.)

There was testimony that the bill of sale and the assignment to Mrs. Hepler were to be considered as absolute transfers, and not merely as transfers by way of security. The fact is unimportant. For the plaintiff's benefit, it may be conceded that under the circumstances the law will regard the transfers as for security only. The result is the same.

It is not necessary to extend this opinion further. Absence of intent to defraud, solvency, and valuable consideration fairly adequate, are the determining facts of the case. The evidence sustains the finding of the district court with reference to these facts, and its judgment is affirmed.

No. 21,138.

WESTYE MONSON, *Appellee*, v. A. C. BATTELLE, *Appellant*.

## SYLLABUS BY THE COURT.

1. **COMPENSATION ACT—Assignment of Judgment.** The question whether an injured workman may assign a judgment under the workmen's compensation act to a trustee for the benefit of his children, considered but not determined.
2. **SAME—Lump Sum Judgment—Death of Employee—Revivor of Judgment.** A lump sum judgment in favor of an injured workman under the workmen's compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of an administrator.
3. **SAME—Injury Occurred on Premises of Employer.** The evidence in an action under the compensation statute held to support a finding that the plaintiff was injured on the premises where he was employed, by having to wade through flood water which had overflowed the defendant's car works; an old wound on his foot being thereby infected, requiring an amputation.
4. **SAME—Injury "By Accident."** Such an injury is one "by accident," within the meaning of the phrase as used in the statute.
5. **SAME—Injury Arose "In Course of Employment."** Such an injury is one arising out of and in the course of the plaintiff's employment, within the meaning of the statute.
6. **SAME—Hypothetical Question.** Objections to the form of a hypothetical question held not to justify a reversal.

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7. *SAME*—*Petition for New Trial—Proceeding on Appeal.* The situation held not to require a withholding of the determination of the case by this court to give opportunity for a hearing on a petition for a new trial.

Appeal from Franklin district court; CHARLES A. SMART, judge. Opinion filed January 12, 1918. Affirmed.

*Adrian F. Sherman*, of Topeka, *Fred M. Harris*, of Ottawa, and *Thad B. Landon*, of Kansas City, Mo., for the appellant.

*W. S. Jenks*, of Ottawa, for the appellee.

The opinion of the court was delivered by

MASON, J.: Westye Monson recovered a lump sum judgment under the workmen's compensation act against A. C. Battelle. An appeal was taken, pending which a revivor was ordered by this court in the name of Elizabeth Appleros, to whom an assignment of the judgment had been executed by the plaintiff, and who is the administratrix of his estate. The defendant moves to set aside the order of revivor, and also asks (in the event of his motion being overruled) that the judgment be reversed because the evidence did not bring the case within the operation of the compensation act.

1. The defendant maintains that the assignment of the judgment was a nullity because forbidden by the statute. (Gen. Stat. 1915, § 5909; Laws 1917, ch. 226, § 5.) The act as it stood at the time the assignment was made read as follows:

"The payments due under this act, as well as any judgment obtained thereunder, shall not be assignable or subject to levy, execution or attachment, except for medicine, medical attention and nursing." (Gen. Stat. 1915, § 5909.)

Here the assignment was made to Elizabeth Appleros, in trust for the four children of the judgment plaintiff. The object of the statute was doubtless to prevent the fund being diverted from the purpose for which it was intended. An assignment to a trustee for the benefit of the children of an injured workman would not seem necessarily to conflict with the spirit of the law. We shall assume, however, without deciding, that the assignment is invalid.

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2. The argument against a revivor being allowed in the name of the administratrix is based upon the contention that "under the compensation law, the right to compensation and any judgment for compensation abates upon the death of the employee, and does not survive to his heirs or representatives." In support of this contention it is argued that compensation where death results from an injury to a workman is allowed only to his dependents, and therefore his heirs as such, or his executor or administrator, have nothing to do with it. That situation, however, is obviously not fully analogous to the one here presented, where a judgment was rendered in favor of the workman. It has been held that a judgment under the compensation act, providing for periodical payments to an injured workman, although subject to commutation, does not survive the plaintiff's death. (*Wozneak v. Buffalo Gas Co.*, 161 N. Y. Sup. 675.) In the case cited the trial court had decided to the contrary, and two of the five appellate judges dissented from the reversal. That decision, however, if accepted as sound, would not control here. In the present case the plaintiff had obtained an absolute personal judgment requiring the immediate payment of a fixed amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded.

The final argument against the right of revivor, is that because the judgment is not assignable it does not survive the death of the plaintiff. It is true that as a rule causes of action which are not assignable do not survive. (1 C. J. 175, 176.) But a judgment based on a nonsurviving cause of action ordinarily does survive (1 C. J. 169), and does so in this state, notwithstanding the pendency of an appeal. (*Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97.) Moreover, while as a rule causes of action which are not assignable do not survive, this is because of qualities that inhere in the nature of the right. Where the statute for some special purpose, as the protection of a

claimant against improvidence, forbids assignment, nonsurvivability does not necessarily result therefrom. The new government war savings certificates are expressly made not transferable, but it will hardly be doubted that the title would pass to the heirs or personal representatives of the owner upon his death. We hold that if the assignment was invalid the revivor was properly made in the name of the administratrix.

3. The plaintiff's claim was that he had been injured by having to wade through foul and impure flood water which had overflowed the yards of the defendant's car works, where he was employed; that at the time an old injury to his foot had not healed; and that infection followed, as a result of which amputation became necessary. The defendant insists that there was no evidence that the loss of the foot was caused by reason of contact with the water. The plaintiff testified that his foot was badly swollen on the morning after the exposure referred to; that the swelling increased for several days; that he received no subsequent injury; and that amputation followed shortly. At least one physician testified that from the history of the case, as embodied in a hypothetical question which fairly covered the ground indicated, he thought it probable that the amputation was made necessary by infection caused by wading through the water. This was sufficient to take that issue to the jury.

4. The statute relates only to injuries "by accident arising out of and in the course of employment." (Gen. Stat. 1915, § 5896; Laws of 1917, ch. 226, § 27.) It is contended that the plaintiff's injury was not the result of an accident. The infection of an existing wound by contact with foreign matter seems to be within the ordinary meaning of the term—"an unlooked-for and untoward event which is not expected or designed." (Notes, L. R. A. 1916A, 227, 1917D, 103; Workmen's Compensation Acts, a Corpus Juris Treatise by Donald J. Kiser, § 54, p. 64.) The contracting of typhoid fever through drinking polluted water furnished by the employer has been held to be attributable to "accident," within the meaning of that term as employed in a compensation statute. (*Vennen v. New Dells Lumber Co.*, 161 Wis. 370; see, also, cases cited there, and in the Corpus Juris Treatise referred to, p. 66.) "An injury may be by accident, although it would not have been sustained by a

perfectly healthy individual." (Corpus Juris Treatise, p. 69.) "The courts very generally hold that if an existing disease is aggravated by accident or injury, compensation must be paid for the resulting injury." (Note, L. R. A. 1917D, 105; see, also, *id.* pp. 129, 130.)

5. The principal contention of the defendant is that, accepting the plaintiff's own version of the affair, the injury did not arise out of or in the course of his employment. He testified that the water covered the railroad track running through the yard of the car works where he was employed; that when he checked in in the morning there was n't much water; that he did n't have to wade through it at noon when he quit work, or at one o'clock when he returned; but that when he checked out at six o'clock in the evening he had to go to the timekeeper's office; that the water was then within five feet of the office and he had to wade over his shoes. The evidence is not very clear on the point, but is open to the construction that the water through which the plaintiff waded was upon the premises where he was employed. It is clear that the injury was received in the course of employment. His going to the timekeeper's office to check out was a necessary incident to the performance of the duties for which he was paid. (*Sedlock v. Mining Co.*, 98 Kan. 680, 159 Pac. 9; Corpus Juris Treatise, § 74, p. 83.) The serious question is whether it arose out of it.

Irrespective of any question of negligence, the standing of the flood water on the ground which was a part of the defendant's factory became for the time being one of the conditions under which the business was carried on. It was not a condition peculiar to the kind of business done, but it was one which gave rise to a special risk incurred by the workmen there engaged. We think the injury (assuming the facts to be as claimed by the plaintiff) is to be regarded as one arising out of the employment. Recoveries under the compensation act can only be had for injuries received in certain specified kinds of business, which are designated as "especially dangerous." (Gen. Stat. 1915, § 5900; Laws 1917, ch. 226, § 1.) But it does not follow that the only injuries for which compensation is provided are those which result from the use of devices or methods which are in themselves exceptionally hazardous. The employer is protected as to this feature of the matter by the

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rule that he is not liable for any injury which happens elsewhere than "on, in or about" his factory; that is to say, in the factory, or in such close proximity to it that the place "is within the danger zone necessarily created by those peculiar hazards to workmen which inhere in the business" of operating it. (*Bevard v. Coal Co.*, 101 Kan. 207, 215, 165 Pac. 657.) But the hazards on account of which the employer may be held liable are not alone those which are the necessary accompaniment of operating any business of like character (*Corpus Juris Treatise*, § 64, p. 74); they include all that result from the carrying on of the business in the way in which it is actually carried on. The driver of a truck who was injured while handling meat in the course of its delivery to a customer, at some distance from the packing house, was held not to be within the protection of the statute. (*Hicks v. Swift & Co.*, 101 Kan. 760, 168 Pac. 905.) But the reason was that he was not hurt "in or about" the factory. His injury, however, arose out of his employment, and if it had happened in the same way while he was loading the truck at the packing house, or at a place immediately adjoining it, he would undoubtedly have been entitled to recover.

The case is not similar to those in which a workman while engaged in his employment is injured by some unexpected extraneous agency, such, for instance, as a stroke of lightning, or the sportive act of a fellow employee, when there is no causal connection between the injury and the condition under which he was required to work. The water had been slowly rising all day prior to the plaintiff's injury, and although its presence was the result of forces beyond the defendant's control, it would have been quite possible for him to have made some arrangements to avoid the necessity for the plaintiff's wading through it. That the making of such an arrangement might have been beyond the requirements of mere ordinary prudence does not affect the matter. An injury may be said to arise out of the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. (*Corpus Juris Treatise*, § 64, p. 73.) In principle the situation is not unlike that presented in *Stuart v. Kansas City*, post, p. 307, decided at this session, where it is held that an employee may recover com-

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pensation for an injury caused by the playful or wanton act of a fellow workman, whose earlier conduct of the same sort had made it possible to anticipate such a happening.

6. Complaint is made of the overruling of an objection to a hypothetical question, on the ground that it seemed that the plaintiff came in contact with the water on four or five different occasions, instead of but once, as he testified, and because the fact that the bones were necrosed was omitted. We do not find the objectionable matter in the question, and any omissions could have been corrected upon cross-examination. In any event, especially as no jury was present, we think no prejudice is shown.

7. We are asked to withhold the determination of the case to give the defendant an opportunity to be heard in the trial court on a petition for a new trial on the ground of newly discovered evidence. That is a matter in which it is competent for the district court to give him protection, if the situation is found to warrant it.

The judgment is affirmed.

PORTER, J., dissents.

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No. 21,139.

SADIE ADAMS, as Executrix, etc., *Appellee*, v. THE IOLA ELECTRIC RAILWAY COMPANY and THE CITY OF IOLA, *Appellants*.

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Street-car Track—Buggy Overturned—Death—Trial—Findings*. In an action for damages for the death of the driver of a horse, occasioned by negligence of a city in the care of its streets and negligence of a street-car company in the operation of a car, the jury returned special findings to the effect that the horse was in the habit of taking fright at street cars, and in the habit of bolting, that the deceased was aware of the habit, and that he had been cautioned about it by acquaintances, but that the horse was reasonably safe for use for driving where likely to meet street cars. *Held*, the findings were not inconsistent with each other nor with the verdict for the plaintiff in the action, when considered in the light of the purpose of the special interrogatories and the evidence bearing on the subject.
2. SAME—*No Prejudicial Error in Record*. Various assignments of error considered, and held to be without substantial merit.

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Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed January 12, 1918. Affirmed.

*Altes H. Campbell, H. A. Ewing, S. A. Gard, and G. R. Gard*, all of Iola, for the appellants.

*W. R. Cline, J. Q. Stratton*, both of Erie, and *F. J. Oyler*, of Iola, for the appellee.

The opinion of the court was delivered by

BURCH, J.: This is a second appeal. The nature of the controversy is sufficiently stated in the former opinion (*Adams v. Electric Railway Co.*, 95 Kan. 781, 149 Pac. 700), holding that the trial court erred in sustaining a demurrer to the plaintiff's evidence. At the second trial the plaintiff recovered, and the defendants appeal.

The first specification of error is that the court erred in overruling the defendants' demurrer to the amended petition. There is nothing to indicate that the petition was changed after the first appeal, and consequently the defendants are precluded from raising this question. Besides this, the petition stated a cause of action.

Under the third specification of error the defendants discuss four propositions, said to be essential to the plaintiff's case:

"1st. That the rail complained of was an obstruction to ordinary travel.

"2nd. That the wheel struck the rail 'in such manner as to prevent it from sliding or skidding east,' and that preventing it from sliding east threw Adams out.

"3rd. That the alleged defect in the street was the proximate cause of the injury.

"4th. That the deceased was not guilty of contributory negligence."

The second proposition assumes that the precise allegations of the petition giving an account of the accident should have been literally proved. That was not necessary, and there was abundant evidence, if believed, that the deceased was thrown from the buggy because the front wheel struck the rail of the street-car track, which projected above the surface of the street. Propositions one, three, and four present questions the solution of which depended on conclusions to be drawn from conflicting and contradictory evidence. The jury has performed that function, and their conclusions are sustained by sufficient evidence.

The fifth and sixth specifications of error relate to instructions. It is said that the instruction regarding the duty of the city to maintain the street in a condition reasonably safe for travel did not make special reference to the fact that a city is not always bound to keep the entire width of a street in proper condition for travel. It is further said the subject was called to the attention of the court by an instruction which the defendants requested. No such instruction is abstracted. The only requested instruction on the subject disclosed by the abstract was substantially given. The instructions which were given fairly stated the law, and there is no reason for believing the jury misapprehended or misapplied them.

The eighth assignment of error is that special findings of the jury were so inconsistent with each other and with the general verdict that the verdict should not be allowed to stand. The subject covered by the findings was thoroughly investigated for the first time at the second trial, and is urged in many ways in opposition to the plaintiff's right to recover. The findings were that the horse which the deceased was driving was in the habit of taking fright at street cars, and in the habit of bolting, that the deceased was aware of the habit, and that he had been cautioned about it by his acquaintances, but that the horse was reasonably safe and gentle for use when driven to a single buggy, where likely to meet street cars, automobiles, and motorcycles. The ultimate purpose of the special questions was to develop the fact that the deceased was guilty of contributory negligence in driving the horse. Occasions on which the horse frightened and bolted were proved, and accepting the questions as they were propounded, the jury assented to the characterization of these exhibitions as habitual. The evidence as a whole, however, sustained the finding that the horse was reasonably safe and gentle for use by the deceased in driving about the streets of Iola. Considered in the light of the evidence and of their purpose, the special findings were not inconsistent with each other or with the general verdict.

Other assignments of error merely present, in different form and aspect, subjects which have already been considered.

The judgment of the district court is affirmed.

No. 21,164.

T. J. RIDGWAY, *Appellee*, v. GEORGE WETTERHOLD, *Appellant*.

## SYLLABUS BY THE COURT.

1. **PATENTS**—*Use of Patented Invention—Infringement—Jurisdiction of State Courts—Pleadings.* An action by the owner of a patent to recover upon an implied contract of defendant to pay him the reasonable value of the use, with the plaintiff's knowledge and consent, of the patent invention, is not an action for the infringement of the patent, and the state courts have jurisdiction, notwithstanding the answer pleads the invalidity of the patent as one of the defenses.
2. **JURISDICTION**—*Amount Involved.* The district court having jurisdiction of the cause, and the amount being for less than \$100, the appeal is dismissed.

Appeal from Sedgwick district court, division No. 1; THOMAS C. WILSON, judge. Opinion filed January 12, 1918. Dismissed.

*P. D. Gardiner*, and *H. C. Castor*, both of Wichita, for the appellant.

*Robert C. Foulston*, of Wichita, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The only question in this case arises over the character of the action; if it is a suit for the infringement of a patent it involves the laws of the United States, and the appeal will lie to correct the error of the lower court in assuming jurisdiction; if it is not a suit for infringement, this court has no jurisdiction because the amount involved is less than \$100. (Civ. Code, § 566.)

It is conceded that the United States courts have exclusive jurisdiction of suits for the infringement of a patent, whether at law or in equity, and without regard to the citizenship of the parties. (30 Cyc. 991, and cases cited.) The plaintiff's contention is, that the action is not for an infringement of a patent, but, on the contrary, is upon an implied contract for the payment of a royalty for the right to manufacture under the patent; that the relationship between the plaintiff and defendant is that of licensor and licensee. The plaintiff seeks to



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bring himself within the principle of those cases where both parties have been estopped by their conduct from raising the question of the validity of a patent, or from disavowing that the plaintiff was a licensor and the defendant a licensee.

The petition alleged that the plaintiff and one Dickson were the "true original and first inventors of a certain new and useful apparatus, fully described in the letters patent hereinafter mentioned, as well as certain improvements thereon, therein named as bed springs and of a type and character which was not known or used in this country, and was not patented or described in any printed publication in this or any foreign country, before their invention thereof, and was not in public use or on sale more than two years prior to their said application for letters patent of the United States." It further alleged that letters patent for this invention were duly issued, and that Dickson transferred and assigned to plaintiff all his right and interest therein; that on the 6th day of July, 1913, plaintiff duly filed in the office of the clerk of the district court of Sedgwick county copies of the letters patent in order to comply with the statute. It is then alleged that for some time prior thereto the defendant used the rights and privileges of the plaintiff conferred by virtue of the letters patent, and manufactured and sold thereunder at a profit numerous bed springs, and that afterward, on the 6th day of July, 1913, defendant took and detained, "with the knowledge and consent of this plaintiff the rights and property secured to him under and by virtue of said letters patent," and between that date and the time of filing the petition manufactured and sold at a profit a large number of bed springs and impliedly agreed to pay plaintiff the fair and reasonable value of the use of the invention; that ten cents was the reasonable value of the use of the patent right for each bed spring so manufactured and sold by the defendant.

The answer denied that plaintiff and his assignor were the true and original inventors of the improvement referred to; denied that the invention was not known or used in this country prior to the issuance of the patent; denied that the alleged invention was not in public use or on sale more than two years prior to the issuance of the patent; denied generally the validity of the patent, and that plaintiff was the owner

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thereof. In addition to denying that defendant had ever used the rights and privileges conferred on the plaintiff by the patent, the answer denied any agreement to pay the plaintiff for such use; and further alleged that any cause of action the plaintiff had, arose under the patent laws of the United States, and that the district court had no jurisdiction.

At first blush the petition and answer appear to present a case falling close to the border line between those cases where the federal courts have exclusive jurisdiction, and cases in which the validity of a patent is only collaterally involved. In one sense an issue involving the validity of the patent was squarely raised by the pleadings, because the plaintiff alleged the validity and novelty of the patent, all of which the answer expressly denied. But were these matters material issues? None of the evidence has been brought up by the appeal; and if the plaintiff might have recovered on one theory of the pleadings, regardless of these issues, we must assume that the trial court had jurisdiction. The petition is somewhat inartistically drawn; it contains a number of averments which would have been quite pertinent and material in a suit for the infringement of a patent, but which were not necessary in an action by the owner of a patent to recover upon a contract to pay for the use by a licensee of rights under a patent. The theory upon which plaintiff claims to have recovered might have been better set forth in his petition by simply alleging the issuance of the patent; that plaintiff by written assignment became the owner of whatever rights were conferred thereby; setting out the arrangement between himself and the defendant and the facts relied upon to show that, aside from any question as to the validity of the patent or its novelty or the extent or scope of the rights conferred by it, the defendant recognized him as the owner of it, and that the relation of licensor and licensee arose between them. The other averments of the petition were sufficient to show that defendant used the rights under the patent with plaintiff's consent, and to show an implied contract to pay a reasonable value for such use.

Giving a liberal construction to the petition, we are inclined to the opinion that the averments as to the novelty and validity of the patent must be regarded merely as matters of inducement, the denial of which in the answer raised only a collateral

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issue. A strong reason for giving this construction to the pleading is the absence of any definite averment indicating an intention to sue for an infringement of the patent, while specific facts are alleged from which the law would declare that plaintiff was a licensor and the defendant a licensee of the right to use the patented article, and that a contract would be implied to pay the reasonable value of such use. The authorities are clear that the state courts have jurisdiction in a case involving compensation for the alleged use of a patent invention and what is covered by it, where the validity of the patent is involved only in a collateral way. (*Deane v. Hodge*, 35 Minn. 146.)

In *Pratt v. Paris Gas Light & Coke Company*, 168 U. S. 255, it was held that where the declaration shows that the state court has jurisdiction both of the parties and the subject matter, "it cannot be ousted of such jurisdiction by the fact that, incidentally to his defence, the defendant claims the invalidity of a certain patent." (Syl. ¶ 2.) The case of *Nash v. Lull*, 102 Mass. 60, is cited in the opinion as the leading case where it was held that "any degree of utility or practical value in a patent will support the consideration paid for it; but that if it be wholly void a note given for it is without consideration, and such issue may be tried in a state court as well as in a federal court." In the opinion in the Pratt case, *supra*, it was said:

"The patent may be void because the invention was well known before; or because it is useless or immoral; or because it is an infringement upon other prior patents, and it is no objection to the jurisdiction of the state court that the question of validity may involve the examination of conflicting patents, or the testimony of experts. It is the fact of its invalidity, and not the reasons for it, that is material." (p. 261.)

It was further said in the opinion that:

"We have repeatedly held that the federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license, or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts. *Hartell v. Tilghman*, 99 U. S. 547; *Wilson v. Sanford*, 10 How. 99; *Albright v. Teas*, 106 U. S. 613; *Goodyear v. Day*, 1 Blatchford, 565; *Blanchard v. Sprague*, 1 Cliff. 288; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46; *Wade v. Lawder*, 165 U. S. 624. Although in an action for royalties,

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Ridgway v. Wetterhold.

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if the validity and infringement of the patent are controverted, the case is considered as one 'touching patent rights,' for the purposes of an appeal to this court under Rev. Stat. § 699. *St. Paul Plough Works v. Starling*, 127 U. S. 376." (p. 260.)

In Walker on Patents, 5th ed., section 388, it is said:

"Actions brought to enforce contracts between private parties relevant to patent rights, are not actions arising under the patent laws of the United States; and therefore are not cognizable as such in the United States courts. And actions to set aside such contracts fall in the same category."

An action in the state court to recover patent royalties, in which no question as to the validity or construction of the patent was involved, does not present any federal question which will give the supreme court of the United States jurisdiction to review the judgment of the state court. (*Felix v. Scharnweber*, 125 U. S. 54.) To the same effect is *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344.

In support of his claim that the pleadings raised an issue that cannot be litigated in a state court, the defendant in his brief says:

"The proverbial 'Bay-horse case' is elusive, often heard of but seldom cited, but appellant offers the following as that case: *DeWitt v. Elmira Nobles Manufacturing Co.*, 66 N. Y. 459."

In the opinion in that case it was said:

"The plaintiff does not claim to recover of the defendant for the use of the patent right and the patented invention referred to in the complaint, by virtue of any contract, expressed or implied, or any agreement by the defendant to pay the plaintiff any compensation or royalty for the right to use the same. In substance the allegations of the complaint are of a use of the patented invention by the defendant without the consent of, or any license or permission by, the plaintiff." (p. 461.)

In that case it was held that a state court has no jurisdiction of an action by the owner of a patent to recover compensation for its use from one who has used it without his consent.

In the case at bar the petition alleged that defendant made use of the patent with the knowledge and consent of the plaintiff; so that the case which defendant claims is a "Bay-horse" appears to be "a horse of a different color."

The district court had jurisdiction, and the amount involved being less than \$100 the appeal is dismissed.

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Lesem v. Harris.

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No. 21,166.

L. D. LESEM, M. REINBERG and TILLIE LESEM, *Appellees*, v.  
BEN HARRIS, *Appellant*.

## SYLLABUS BY THE COURT.

1. *CONTRACTS—Written Contract—Contemporaneous Verbal Contract—Verbal Contract Disregarded.* To the petition to recover on a written contract for the payment of money the answer set up an additional written contract made at the same time, and also a verbal contract varying the terms of the written instruments. *Held*, that under the primer and horn-book rule such oral agreement was properly disregarded.
2. *SAME—Petition—Answer—Judgment on Pleadings Improper.* The petition alleged ownership by the plaintiffs of a certain lease, a part of the consideration for the written instrument sued on. The answer pleaded failure of consideration, and contained a general denial. *Held*, that it was error to render judgment for plaintiffs on the pleadings.
3. *SAME—Motion to Make Definite—Properly Overruled.* The motion to make the petition more definite and certain was properly overruled.

Appeal from Crawford district court; ANDREW J. CURRAN, judge. Opinion filed January 12, 1918. Modified.

George H. Stuessi, of Pittsburg, for the appellant.

Arthur Fuller, and W. J. True, both of Pittsburg, for the appellees.

The opinion of the court was delivered by

WEST, J.: The parties were owners of the capital stock of a shoe company. The plaintiffs sold the defendant their stock and interest in the goods and in the lease of the building where the business was carried on, for \$1,000, evidenced by a written contract. At the same time another written agreement was made, providing for the payment of another \$500 on certain conditions. In addition, the answer set up a third agreement, made orally, to the effect that if the defendant should negotiate a certain compromise settlement with the creditors of the company the plaintiffs should transfer all their interest. Further, that if such contemplated settlement could be made by the defendant for a sum not exceeding fifty cents on the dollar for the

total liabilities of the company, then after the transfer by plaintiffs of their interest in the stock of goods and lease, the defendant was to pay plaintiffs a further sum of \$500 as a consideration for the transfer of the stock and lease, but in no event should either of these sums be due or payable to the plaintiffs unless such settlement should be made and consent of the owners to the transfer by the plaintiffs of the lease to the defendant should be obtained, and the lease transferred at the same rental value provided in such lease, which contained a condition that no transfer or assignment could be made without the written consent of the lessors. It was further alleged that after this oral agreement a settlement was attempted, but without avail, because of the conduct of the plaintiffs, thereby eliminating the consideration for the defendant's contract to pay any sum whatever. That it afterwards developed by a proceeding in bankruptcy that the company, and not the plaintiffs, owned the lease, which was ordered sold by the trustee as a part of the estate of the bankrupt company, and that the defendant was compelled to buy in the assets, including the lease. Instead of replying to this answer, plaintiffs moved for judgment on the pleadings, which motion was sustained. The defendant's motion for new trial was overruled, and he appeals.

The court correctly construed the allegation of the oral contract as an attempt to vary the terms of the written agreement sued on. But the petition alleged ownership in the plaintiffs of certain shares of capital stock and of the lease, and the delivery of both to the defendant. It is argued by the defendant's counsel that the answer put in issue the ownership of the lease and the delivery of the goods and lease, and this is true.

It was alleged that upon determination that the lease belonged to the estate and not to the plaintiffs, it was put up for sale, and the defendant "was compelled to so purchase said stock and said lease, as the assets of said corporation, in order to secure the legal title and possession of the same to him, . . ." It cannot be told from the answer whether the possession of the lease was taken from the defendant or not. The only clear thing alleged in the answer is failure of consideration. If the plaintiffs did not own the lease, this, of course, would amount to a partial failure; but laying aside the long story about a verbal agreement, entirely out of harmony with

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the written contract, the defense indicated was pleaded, and it was error to render judgment on the pleadings: (*McCready v. Dennis*, 73 Kan. 778, 85 Pac. 531; *Sparks v. McAllister*, 80 Kan. 546, 103 Pac. 127; *Cobe v. Coughlin*, 83 Kan. 522, 112 Pac. 115.)

The petition was not vulnerable to the motion to make definite and certain, and such motion was properly overruled.

The judgment is modified as indicated, and the cause remanded for further proceedings in accordance herewith.

No. 21,172.

MONTGOMERY COUNTY NATIONAL BANK, *Appellant*, v. I. W. WHERRY, *Appellee*.

SYLLABUS BY THE COURT.

1. CHATTEL MORTGAGE—*Possession by Mortgagee—Conditional Sale by Mortgagee—Not Determinative of Value of Property.* Where a mortgagee takes charge of mortgaged chattel property on the default of the mortgagor and endeavors to sell it, but only succeeds in making a conditional and abortive sale, the price fixed in the conditional and abortive sale is not necessarily a fair and reasonable basis for determining the true value of the property. •
2. SAME—*Invalid Sale by Mortgagee—Conversion of Property.* Where a mortgagee takes charge of chattel property, owing to the default of his debtor, the mortgagor, it is the privilege of the mortgagee under the expressed terms of the mortgage to sell the mortgaged property outright, but the mortgagee has not the right to make a conditional sale of the property; it is technically a conversion of the property to make such conditional sale of it, and the mortgagee is liable to the mortgagor for the fair and reasonable value of the property at the time of such conversion.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed January 12, 1918. Reversed.

*L. P. Brooks*, of Cherryvale, for the appellant.

*H. A. Pritchard*, of Fort Scott, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff loaned \$500 to the defendant upon his promissory note, secured by chattel mortgage covering the equipment of a billiard parlor in Cherryvale. The mort-

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gage contained the usual and familiar recitals of the rights and privileges of a mortgagee of chattels, and further—

"If from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency."

Shortly afterwards the defendant sold his equity in the chattel property and left the community and paid no further attention to the note, mortgage, or mortgaged property.

After the maturity and default of the note the plaintiff took possession of the property under its mortgage, rented it for two months at \$10 per month, sold some of the property for \$48, and made a conditional sale of the remaining chattels to one H. A. Monteath, for \$450. The contract of sale provided that title to the property should remain in the bank until the balance of the purchase price was paid. Monteath paid the bank \$35 and then returned the property and refused to make further payments. Since then the bank has made repeated but unavailing efforts to sell the property, and is ready to deliver to defendant the property undisposed of on payment of the balance due on his note.

The plaintiff brought this action to recover the amount alleged to be still due on the note. The defendant's answer demanded an accounting, and alleged that such accounting would show nothing due.

The trial court, among other matters above narrated, found as follows:

"That the selling price to Monteath of \$450 together with the \$35.00 [paid] by him and \$20.00 received for two months' rent and \$25.00 received for show case and \$10.00 received for cash register and \$3.00 received for stove, equals the amount due on the note to the plaintiff from the defendant at the time the property was sold to Monteath.

"Wherefore, it is considered, ordered and adjudged that the defendant have judgment for costs herein and go hence without day."

The bank appeals. Appellee raises the point that no transcript of the evidence was filed in the district court, but that only limits our labors touching the scope of the review.

The pleadings, findings, and judgment are here, and they are sufficient to require consideration of the error presented in the appeal. Plaintiff states it thus:

"The bank claims the court erred in allowing the credit of \$450.00, which was to be but which was never paid on the conditional sale, and



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that it should have rendered a deficiency judgment against the defendant for the balance due after allowing the \$93.00 credit as a partial payment."

Plaintiff's contention is not precisely correct, and neither in our opinion was the judgment of the trial court. Defendant was not entitled to a credit for the full amount for which the property was conditionally sold. The bank's transaction with Monteath was not an outright sale, and the amount for which the property was only conditionally sold in that abortive transaction was not a fair basis on which to fix the value of the property. But the bank was not authorized to make a conditional sale of the property. It was authorized to sell it outright, even at a sacrificial price if it did so in good faith. But when it made a conditional sale of the mortgaged chattels, it was guilty of converting the property (38 Cyc. 2005, 2022), and the legal consequence of that conversion was to charge the bank with its fair and reasonable value. (13 Cyc. 170; see, also, *id.* 69, 70.) It is intimated in defendant's brief that a city ordinance barring the maintenance of billiard parlors in Cherryvale is the real cause of the property being locally unsalable. However that may be, there is certainly a market for billiard-hall property somewhere, which the litigants ought to be able to ascertain without difficulty, and that market value, less freight charges and any other proper deductions, would indicate approximately the fair value of the property. (8 R. C. L. 489.) There may be other ways of ascertaining its true, fair, and reasonable value. To determine the fair value of the property at the time it was converted, and to give defendant credit on the note therefor, and to render judgment for plaintiff for the balance, if any, still due after giving that credit, the judgment of the trial court will be reversed and the cause remanded with instructions to that effect.

It is so ordered.

No. 21,174.

MAY H. SNELLING, *Appellee*, v. THE NATIONAL TRAVELERS  
BENEFIT ASSOCIATION, *Appellant*.

## SYLLABUS BY THE COURT.

1. **VENUE**—*Action against Foreign Insurance Company.* Under section 53 of the civil code, an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found, regardless of where the cause of action arose, or of the residence of the plaintiff.
2. **SAME**—*Construction of Statute.* The provision in the last part of section 53, that an action against a foreign insurance company *may* be brought in any county where the cause of action or some part thereof arose, is a permissive and cumulative remedy.
3. **SAME**—*Foreign Insurance Company — Service on Licensed General Agent Sufficient.* Service upon a duly licensed general agent of the defendant, whose principal office and place of business is in the county and who is vested with full power and authority to appoint and remove all local, special, or soliciting agents of the defendant in a certain territory of the state, is deemed to be sufficient to give the court jurisdiction of the defendant.
4. **SAME**—To acquire jurisdiction in the way stated does not violate the fourteenth amendment of the federal constitution.

Appeal from Shawnee district court, division No. 2; GEORGE H. WHITCOMB, judge. Opinion filed January 12, 1918. Affirmed.

A. A. Godard, J. Arthur Myers, both of Topeka, and Ernest K. Maine, of Des Moines, Iowa, for the appellant; Fred P. Carr, of Des Moines, Iowa, of counsel.

S. S. Alexander, of Kingman, and E. E. Brookens, of Topeka, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: May H. Snelling recovered judgment against the National Travelers Benefit Association upon an accident policy issued by the defendant to her husband, Thomas Snelling. The defendant is an Iowa corporation doing business in this state. The accident in which Snelling lost his life occurred near West Plains, Mo., where he and plaintiff were then residing. After her husband's death plaintiff made

her home with relatives in Oklahoma. On October 27, 1915, this action was commenced in the district court of Shawnee county and service was had upon defendant on November 3, by delivering a copy of the summons to W. D. O'Kell, an agent of the defendant at Topeka. Appearing specially, the defendant filed a motion to quash the summons and dismiss the action for the reasons that the cause of action did not arise in Shawnee county, Kansas; that plaintiff was not a resident of that county; that the summons was not served upon such an agent of the defendant as would give the court jurisdiction over it; and that the court had no jurisdiction of the subject matter of the action. Evidence for and against the motion was introduced. From the records of the state superintendent of insurance, introduced by plaintiff, it appeared that the defendant had filed a written appointment of O'Kell as its general agent at Topeka, with power to appoint and remove local, special, and soliciting agents, and that on March 1, 1915, he was duly licensed by the insurance department as such agent. A certificate of the superintendent of insurance under date of December 18, 1915, stated that O'Kell had been licensed to act as such agent for the current insurance year ending on the last day of February, 1916, and that at the request of O'Kell the license was canceled on November 11, 1915, although the defendant had not yet requested it nor revoked O'Kell's appointment. The court denied the motion. After an answer by defendant containing denials of the averments of the petition, a trial was had on the merits, which resulted in a verdict for the plaintiff, and defendant's motion for a new trial having been overruled, it appeals.

The principal controversy between the parties on this appeal is whether or not the trial court had jurisdiction over the subject matter and of the defendant, and whether the service of summons that was made is sufficient in an action against a foreign insurance company. The action is a transitory one and, except as limited by statute, may be brought in any county where service upon the defendant may be obtained. The first three sections of the article in the code upon venue in civil actions relate to the bringing of local actions, and following them, section 53 of the code provides:

"An action, other than one of those mentioned in the first three sections of this article, against a nonresident of this state or a foreign

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Snelling v. Benefit Association.

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corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose." (Gen. Stat. 1915, § 6943.)

This is followed by the sweeping provision of section 55 of the code, that "every other action must be brought in the county in which the defendant or some one of the defendants reside or may be summoned." (Gen. Stat. 1915, § 6945.) The first part of section 53 is general in its application to nonresidents and to foreign corporations, but if the defendant is a foreign insurance company the plaintiff is given the added privilege of bringing his action in any county where the cause of action arose. The statute does not require that an action against a foreign insurance company *must* be brought in that place, but only that it *may* be brought there. The last clause of the section is a permissive and cumulative remedy. That, in effect, was determined in *Henry v. Railway Co.*, 92 Kan. 1017, 142 Pac. 972, where it was contended that the term "may" as used in section 51 of the code should be construed in a mandatory sense, but it was held:

"Where in the article of the code relating to venue it is provided that certain actions 'must' and that others 'may' be brought in certain counties, and that all others must be brought in the county in which the defendant resides or may be summoned, the actions with respect to which the permissive term 'may' is used, are not thereby rendered local, but they may be brought in any county in which the defendant may be summoned." (Syl. ¶ 1.)

This view was reaffirmed in *Hill v. Railway Co.*, 94 Kan. 254, 146 Pac. 351. (See, also, *Handy v. Insurance Co.*, 37 Ohio St. 366; *Osborn et al. v. Lidy*, 51 Ohio St. 90.) For the same reason, the term "may" used in section 53 should be regarded as permissive, and, therefore, a plaintiff may at his option employ this added facility as against a foreign insurance company, or he may use the other provision, which authorizes the bringing of an action in any county in which the foreign insurance company may be found. Under the first part of the section it is immaterial who the plaintiff is or where the cause of action arose. The plaintiff may sue foreigners, natural or artificial, in any county where they have property or debts owing to them, or where they may be found, regardless of the place

where the cause of action arose, if there is jurisdiction of the subject matter. If the nonresident is a foreign insurance company doing business in the state, the added remedy is given, so that it may be sued wherever the cause of action or some part of it arose. An action may be brought against it although it has no property or debts owing to it in the state, providing jurisdiction of the party can be obtained by voluntary appearance or service of process in any way authorized by statute. The defendant, being a foreign corporation, may be sued in any county where it may be found, and it may be found wherever service may be made upon it. In *Insurance Co. v. National Bank*, 58 Kan. 86, 48 Pac. 592, it was contended that as both parties were foreign corporations, and as the cause of action was not based on a contract of insurance entered into in this state, the defendant, a foreign insurance company, could not be sued unless service was obtained on one of its principal officers. It was held that such a company might be sued in a county where it maintained an agent having general authority upon insurance contracts and other contracts as well. It was remarked that "the old theory that a corporation resides only in the state of its creation no longer obtains. It is now held that, for the purpose of conferring jurisdiction on the courts, a corporation is present in any place where it transacts its business; and that service of process may be made on its agents, through whom, as its instruments, its business is transacted. The intangible corporation is held to be present wherever its business is carried on, whether that be in the state where its charter was obtained, or in any other sovereignty. *St. Claire v. Cox*, 106 U. S. 350." (p. 88.) (See, also, *Mystic Legion v. Brewer*, 75 Kan. 729, 90 Pac. 247.) In this case the service was made upon a duly authorized agent of the defendant, whose principal office and place of business was in the county and who was vested with general authority.

Some complaint is made of an instruction, but we find nothing substantial in it. Neither do we find any good ground for the objection that the rulings and judgment of the court are in contravention of the fourteenth amendment of the federal constitution, in that it deprives the defendant of property without due process of law.

The judgment is affirmed.

No. 21,175.

GROVER C. JAMES, as Receiver of the Joplin Trust Company,  
*Appellant*, v. R. E. WILLIAMS, *Appellee*, et al.

## SYLLABUS BY THE COURT.

1. NOTE AND MORTGAGE—*Deed—Merger of Title in Mortgagee—Note Canceled—Mortgage Lien Kept Alive.* For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor, or of any one else, for satisfaction of the debt.
2. SAME. The holder of a mortgage on real estate took a quitclaim deed of the premises, in lieu of his mortgage. The deed was made by a grantee of the mortgagor, who had not assumed payment of the debt. The mortgagee took possession under the deed, canceled the mortgagor's note, and surrendered it. The debt was not satisfied by any one, and the mortgage was not released. The mortgagee then discovered that the maker of the quitclaim deed had given a mortgage on the premises. This mortgage recited that it was subject to the other. The holder of the second mortgage sought to foreclose it as a first lien. *Held*, the principle stated in paragraph 1 applies, and the junior mortgagee's position was not bettered because the first mortgagee canceled and surrendered the note secured by his mortgage.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed January 12, 1918. Affirmed.

*E. B. Morgan*, of Galena, and *E. F. Cameron*, of Joplin, Mo., for the appellant.

*S. C. Westcott*, of Galena, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one to foreclose a real-estate mortgage on property to which the defendant held a deed. The defendant asserted priority of a mortgage to himself, antedating the plaintiff's mortgage and the deed. Judgment was rendered in favor of the defendant, and the plaintiff appeals.

In 1909 owners of the property mortgaged it to the defendant to secure payment of a note for \$1,000. Through successive conveyances to grantees who did not assume the mortgage, title passed to Della A. Betz, subject to the mortgage.

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In September, 1912, Della A. Betz and her husband made a quitclaim deed of the property to the defendant, in lieu of his mortgage. As a part of the same transaction the defendant gave the husband of Della A. Betz an option to repurchase within six months, for the amount of the mortgage and interest, plus such expenditures as the defendant might make in order to render the premises tenantable and a source of income. The defendant took possession under his deed, made necessary repairs, insured the property, rented it, collected the rents, and paid the taxes. The plaintiff then sued to foreclose a mortgage given by Della A. Betz and her husband before they deeded to the defendant. The defendant was ignorant of the existence of this mortgage, which recited that it was subject to his mortgage, until served with summons in the foreclosure suit. Interest on the note secured by the defendant's mortgage was paid to February, 1912. After receiving his deed the defendant marked the note paid and returned it to the makers, but did not cancel the mortgage. The debt was not satisfied by any one. The district court gave the defendant a first lien for the amount of his mortgage and interest, and for the balance remaining after deducting receipts from the property from expenditures upon it.

The plaintiff contends that the defendant by canceling his note and releasing the makers from personal liability, no one else being obligated to pay the debt, forfeited his right to a lien. It is said there can be no mortgage without a debt which is secured, and there can be no debt without a debtor who is obligated to pay. The cases decided by this court in which declarations of this character have been made are collated and urged as controlling. It is not necessary to review them. A former justice of this court was accustomed to say that the doctrine of estoppel applies when it ought to apply. So it is with the declarations referred to, and doubtless they were properly applied in the cases cited. They are not, however, of universal application, and equity has never so regarded them. For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor or any one else for satisfaction of the debt.

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It is not necessary to consume space by stating the familiar principles comprised in the doctrine of merger. In this instance the interest and the intention of the mortgagee that merger should not take place were unmistakable, and the ordinary rule governs:

"If a mortgagee purchases the equity of redemption and gives up the mortgage note, without intending this to operate as a payment, the mortgage not being discharged, there is no merger or extinguishment of the mortgage, as against an intervening title, as for instance, by levy, judgment, junior mortgage, or conveyance." (2 Jones on Mortgages, 7th ed., p. 397, § 871.)

Among other cases cited in support of this text is that of *Coburn v. Stephens et al.*, 137 Ind. 683. In that case the mortgagee took a quitclaim deed from the mortgagor, under an agreement to release the mortgagor from personal liability, the mortgage, however, to remain a lien on the premises. It was held that the mortgage remained superior to a mechanic's lien which attached before the quitclaim deed was delivered. Another case is that of *Brooks v. Rice*, 56 Cal. 428, in which the deed was taken under an agreement to surrender the notes and mortgages, which was done. The lien of the mortgages was preserved against an intervening mortgage. Another case is that of *Shattuck v. Bank*, 63 Kan. 443, 65 Pac. 643. In that case the mortgagee took from the mortgagor a quitclaim deed, under an agreement that the mortgagor should not be liable for any deficiency remaining after exhausting the security. A junior incumbrancer claimed priority. Authorities were cited to the effect that even when parties have undertaken to discharge a mortgage, it will be upheld as a lien when it is to the interest of the mortgagee to do so because of some intervening cause, and the decision was that the junior incumbrancer's position had not been bettered by release of the mortgagor from personal liability.

In one of the authorities cited in the Shattuck case the expression was that a released mortgage would be upheld "as a source of title." The plaintiff says such a doctrine can apply in those states only in which the common-law theory that a mortgage confers title prevails, and that in this state a mortgage is merely security. The phraseology employed was, indeed, derived from the common law, but the equitable doctrine



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involved did not depend on phraseology, and was applied by this court as a part of the jurisprudence of this state, as it was by the courts of Indiana and California, where the common-law theory of mortgages is not recognized. All that is necessary in order to make the phraseology conform to the modern theory is to substitute the words "subsisting lien" for the words "source of title."

The doctrine has been spoken of as equitable. It is equitable, because a junior incumbrancer ought not, in conscience, to reap where he did not sow, to the detriment of another who was innocent of wrongdoing. The doctrine applies with special force to the plaintiff, whose mortgage recited that it was subject to the defendant's mortgage.

There may be some doubt about the right of the defendant to claim, in addition to his mortgage, a lien superior to the plaintiff's mortgage for net expenditures on the property. The findings do not clearly show that the expenditures were limited to protection and preservation of the property, inuring ultimately to the benefit of the junior incumbrancer. (*Lumber Co. v. Bowersock*, 100 Kan. 328, 334, 164 Pac. 156.) Perhaps as a practical matter the subject is not important, and for that reason the court's ruling respecting it was not assigned as error.

The judgment of the district court is affirmed.

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No. 21,176.

GERALD S. COBURN, H. C. MOORE, and R. J. BOSHER, *Appellees*,  
v. JOHN W. SIMPSON, *Appellant*, et al.

SYLLABUS BY THE COURT.

1. **WRITTEN INSTRUMENT**—*Purporting to Transfer Real Estate—Testamentary in character.* An instrument which described itself as a "will testament," by which the signer undertook to "will" a part of his property to his sons, and the remainder at his death to his widow, who was named as administratrix, no word being used appropriate to a present grant, held to have been wholly testamentary in character, although acknowledged and recorded and not witnessed.
2. **TRIAL**—*Stipulation—Judgment on Pleadings and Stipulation—Error.* When a cause was called for trial the parties filed a stipulation that certain statements were facts in the case, a right to introduce further

## Coburn v. Simpson.

evidence being expressly reserved. The plaintiffs then moved for judgment in their favor on the pleadings and findings. *Held*, that such a motion could only be rightfully sustained if the answer failed to state a defense, or if it or the agreed statement of facts contained something fatal to the defendant's recovery. For the purpose of such motion the allegations of the answer, unless contradicted by the agreed statement, must be assumed to be true, although not referred to in the stipulation.

3. **WRITTEN INSTRUMENT—Pleadings—Issues—Title—Gifts.** The answer, although characterizing as a deed the instrument described in the foregoing paragraph number one, and relying on it as conveying title to the land therein referred to, held to have presented also the issue of the passing of title by an oral gift, followed by possession and lasting and valuable improvements.

Appeal from Butler district court; ALLISON T. AYRES, judge. Opinion filed January 12, 1918. Modified.

*N. A. Yeager*, and *R. A. Cox*, both of Augusta, for the appellant.

*Burdette Blue*, of Bartlesville, Okla., for the appellees; *M. E. Michaelson*, of Bartlesville, Okla., of counsel.

The opinion of the court was delivered by

MASON, J.: On June 9, 1914, Sarah A. Simpson executed an oil and gas lease. Thereafter assignees of the lease brought this action to determine its validity. John W. Simpson, the only defendant who made a contest, filed an answer asserting that the lease is invalid because he, and not the lessor, his mother, was at the time of its execution the owner of the land covered. The parties agree that on March 6, 1886, the tract belonged to Andrew M. Simpson, the husband of Sarah A. Simpson and the father of John W. Simpson. The defendant asserts that on that date his father made a distribution of a part of his property among his children, giving to the defendant the tract referred to. The plaintiffs allege that Andrew M. Simpson continued to own the land until his death on November 21, 1907, and that by his will it passed to his widow. When the case was called for trial a stipulation was entered into agreeing upon certain facts. The plaintiffs thereupon moved for a judgment in their favor upon the pleadings and the agreed statement. The motion was sustained and a judgment was rendered accordingly, from which the defendant appeals.

1. The answer included a statement that the land had been conveyed to the defendant by his father on March 6, 1886, and it was agreed that on that date a writing signed by Andrew M. Simpson had been acknowledged by him, and a month later had been recorded in the office of the register of deeds, reading as follows:

"The Will Testament of Andrew A. Simpson.

"I will to my oldest son Andrew M. Simpson, Jr. Two Thousand Dollars which he has already had, and to my second son Edgar O. Simpson, the North-west quarter of Section Twenty-four (24) Township Twenty-eight (28) Range Two (2) East of the 6 P. M. in the county of Sedgwick State of Kansas, and to my daughter Mary A. Simpson Lots Forty-one to Forty-eight inclusive in Block 5, Bellamy's subdivision to South Englewood in county of Cook and state of Illinois, and the west half of the east half of the west half of the south east quarter of section Twenty four Township thirty-six (36) Range Eleven (11) East Third to P. M. in the county of Will and state of Illinois, and to my third son James A. Simpson, the south half of the south-east quarter and the south east quarter of the south-west quarter of section Thirty two (32) Township Twenty seven (27) Range Four (4) county of Butler and state of Kansas, and to my fourth son John W. Simpson, the north-east quarter of the south-east quarter of section Thirty-two (32) and the west half of SW one fourth of section Thirty three (33) Township Twenty seven (27) Range Four (4) in the county of Butler and state of Kansas, [being the land in question] and my wife Sarah A. Simpson is to have the rent, use or occupy the same so long as she lives or sees fit, and to my wife Sarah A. Simpson all other real estate and personal property whatsoever that I own or may own at my death, the said Sarah A. Simpson to be the administratrix without bonds and be guardian of my children.

ANDREW M. SIMPSON."

The first question to be determined is whether this instrument can be regarded as a conveyance. The defendant maintains that it should be given that character because it shows on its face that it was so intended, or at any event this conclusion follows when it is considered in the light of surrounding circumstances. It is of course true that the purpose of the maker should control; but it must be determined from the language used, other evidence being admissible only to explain ambiguities or make application of its provisions. We do not discover in the words of the document anything indicating that the person who signed it regarded it as a deed, or suggesting a doubt of his intention in that regard. The fact that in the first

clause the two thousand dollars, which is disposed of to the maker's son Edgar, is spoken of as a sum which he had already had, is entirely consistent with a testamentary purpose to forgive a debt arising upon a loan of that amount. That the instrument is described as a "will testament" is, of course, not conclusive, but is very significant in the absence of any word of present grant. The residuary clause disposing of all other property owned by the maker at his death, and the designation of an administratrix, also tend strongly to characterize the instrument as a will. The fact that the instrument was acknowledged and recorded might have some tendency to show that it was regarded as a conveyance, if its language were sufficiently obscure to call for interpretation in that regard; but that condition does not exist. Moreover, whatever else the signer may have had in mind, his purpose was clearly in part testamentary, and the failure to have his signature witnessed suggests strongly that he supposed the acknowledgment to be a substitute for attestation. We approve the ruling of the trial court holding that the writing did not amount to a conveyance.

2. This question being settled, there was nothing in the agreed statement of facts that tended to establish the claim of the defendant to be the owner of the land. The plaintiffs insist that nothing remains to be decided—that the case was submitted upon an agreed statement of facts, which superseded the pleadings and dispensed with any other form of proof. The record, however, does not bear out this contention. The journal entry recites that when the case was called, the parties having announced that they were ready for trial, "there was filed in open court a stipulation [in] writing agreeing to certain facts in issue in said case; the plaintiffs thereupon moved the court for a judgment on the pleadings and upon said agreed statement of facts"; and that the motion was sustained. It would, of course, have been competent for the parties to agree that the case might be heard and determined upon the pleadings and the stipulation, waiving the right to introduce other evidence. In that situation a judgment for the plaintiffs could only be reversed if their own pleadings or the agreed statement affirmatively showed that the defendant was entitled to recover. But that is not what the record shows to have taken place. The agreed statement bore this introduction: "It is

hereby stipulated and agreed by and between the plaintiffs herein and the defendant, John W. Simpson, that the following are facts [not *the* facts] in this case. Either party reserves the right to offer further material facts or evidence as they may desire." The record does not show that the defendant asked to be allowed to introduce any other evidence, but it does not show that he in any way waived the right to do so. The motion of the plaintiffs resulted in a judgment being rendered before reaching the stage of the trial when such evidence would naturally be offered. The motion was analogous to a demurrer to the answer, as modified by any admissions of the defendant made in the agreed statement. The question it presented was not whether the agreed statement showed affirmatively that the defendant ought to recover, but whether it or the answer contained anything that was necessarily fatal to his recovery. The decision in its entirety can be upheld only if the latter was the case, or if the answer failed to state a defense.

3. The remaining question is whether the answer tendered any issue other than the acquiring of title by the defendant through the instrument referred to. It distinctly declared upon the instrument as a conveyance, and did not explicitly allege an oral grant. Some of its allegations, however, pointed to a purpose to rely upon the instrument (if it should be held not to amount to a deed) as corroborative evidence of a gift. For instance, it alleged that the defendant had made lasting and valuable improvements, and this could hardly have been for any other purpose than to support the claim of a passing of title irrespective of the writing. The portion of the answer bearing upon this aspect of the case reads as follows:

"That at said time [of the signing of the instrument referred to] he [Andrew M. Simpson, the signer thereof] made a distribution of property belonging to him and gave to his children each certain tracts of land, and money with which to buy land and executed a written instrument [the one in question] confirming and conveying to them, certain tracts and parcels of land therein described specifically conveying to this defendant [the tract in question]. . . . That said conveyance to this defendant had a condition therein named, that said Sarah A. Simpson was to have the rent, use and occupance of the same so long as she lived or saw fit. That said conveyance was made with the full knowledge and joint consent of said Sarah A. Simpson. . . . That said Sarah A. Simpson continued to use and occupy said land until this defendant attained the age of majority and had attained the age and discretion in

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which he was capable of managing said property, at which time and in the year 1903, said Sarah A. Simpson and her husband turned over to this defendant full possession and control thereof, after which this defendant paid Sarah A. Simpson rent as provided by the conveyance. . . .

"That at all times after the 6th day of March, 1886, this defendant was recognized by said Andrew M. Simpson and Sarah A. Simpson as the fee owner of said land subject to the conditions named in said conveyance. That in pursuance of said conveyance and recognized ownership in him, this defendant made lasting and valuable improvements on said land to the amount of more than \$1,000.

"That this defendant has been in the open, notorious and undisputed possession of said land herein described under color of title for more than fifteen years last past."

We regard these averments as sufficient, by a very liberal construction, to present the issue whether the defendant acquired title by an oral gift, followed by possession and improvements, upon which he was entitled to present evidence.

The judgment is affirmed so far as it is a determination that no title passed by the writing, but is modified to conform to what has just been said, and the cause is remanded with directions to proceed with the trial of the other issue.

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No. 21,177.

NOAH NEAL, *Appellee*, v. A. E. KENT, *Appellant*.

SYLLABUS BY THE COURT.

CITY COURT—*Illegally Established—Judgment—Jurisdiction of District Court on Appeal.* The case was taken by appeal from the city court to the district court, where both parties without objection filed amended pleadings and the case was tried, resulting in a judgment for the plaintiff. Subsequently the act creating the city court was declared unconstitutional and void. (*State, ex rel., v. Deming*, 98 Kan. 420, 158 Pac. 34.) *Held*, that the district court having jurisdiction of the subject matter and of the parties, it was too late for defendant to question its jurisdiction either to entertain the appeal or to permit amendments to the pleadings.

Appeal from Reno district court; FRANK F. PRIGG, judge.  
Opinion filed January 12, 1918. Affirmed.

C. M. Williams, and D. C. Martindell, both of Hutchinson,  
for the appellant.

W. A. Huxman, of Hutchinson, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The action was commenced in the city court of the city of Hutchinson, and a trial resulted in a judgment for the defendant. The plaintiff appealed to the district court, and on January 19, 1916, recovered judgment. On June 21, 1916, the defendant filed a motion to vacate the judgment, claiming that the court had no jurisdiction to entertain the appeal because of the decision in *State, ex rel., v. Deming*, 98 Kan. 420, 158 Pac. 34, in which the act establishing the city court of Hutchinson was declared unconstitutional and void. The motion was overruled, and the appeal is from that ruling.

In the original bill of particulars the plaintiff alleged that he purchased of defendant two mares, giving in consideration therefor his promissory note for \$450; that the note had been transferred to an innocent purchaser; that defendant guaranteed the mares to be sound and suitable for farm work; that one of them was worthless; and that he had offered to return the mares, and demanded return of the purchase price. He sued to recover \$450. After the cause reached the district court he filed a motion for permission to amend the bill of particulars, alleging that, as only one of the mares was not as guaranteed, he preferred upon due consideration to retain the sound one and recover damages for the defective one, and that the amendment would in no wise prejudice the defendant, because the evidence would be the same in either case. No objection was made by defendant, and the court allowed the amendment. The defendant then answered the amended petition, and the case proceeded to judgment.

The defendant now contends that the district court had no jurisdiction because the court where the case was commenced was not legally established, and therefore the whole proceedings must fail. There is also a contention that the district court lacked jurisdiction to permit plaintiff to amend his bill of particulars and change the nature of his cause of action. Neither contention is sound. The defendant made no objection to the amendment, but on the contrary waived any objection he might have had thereto by filing an answer and submitting the controversy to the court. For the same reason it is too late for him to object to the jurisdiction. The district

court had jurisdiction of the subject matter, and since both parties came into court and litigated the matter without objection, the court had jurisdiction of the parties. Both are estopped from afterwards claiming that the court was without jurisdiction.

In *Miller v. Bogart*, 19 Kan. 117, the action was brought before a justice for the recovery of property valued at \$15. There was a judgment for the defendant, and the plaintiff appealed to the district court, where the plaintiff recovered a judgment. At a later term of the court the defendant moved to set aside the judgment and dismiss the appeal because the statute only authorized appeals in such cases where the amount involved was at least \$20. It was claimed that the district court could take no jurisdiction by the appeal. The district court sustained the contention and set aside the judgment. On appeal it was held that the district court, being one of general original jurisdiction in an action of replevin, and the parties having voluntarily appeared and tried the question, the defendant could not be permitted to plead want of jurisdiction.

In *Mo. Pac. Rly. Co. v. Lea*, 47 Kan. 268, 27 Pac. 987, the action was commenced in a justice court, where plaintiff recovered judgment in the sum of \$300, for hay that had been destroyed. The defendant appealed, and the plaintiff filed in the district court an amended bill of particulars claiming that the value of the hay was \$360. Without any objection to the amendment defendant answered, but subsequently filed a motion to dismiss the appeal for want of jurisdiction. The motion was overruled, and on the trial the plaintiff was given judgment. The defendant appealed, and it was held that the motion to dismiss came too late. To the same effect is *Telegraph Co. v. Moyle*, 51 Kan. 203, 32 Pac. 895. Numerous other cases might be cited, but these are sufficient to show that defendant's contentions are without merit.

The judgment is affirmed.



No. 21,180.

DAVID R. NEIL, *Appellee*, v. JOHN P. STUART et al., *Appellants*  
(ANDREW NEIL and LULA KEITH COOKSEY, *Appellees*).

## SYLLABUS BY THE COURT.

1. *WILL—Construction—Interest of Devisees.* The will involved herein devised the testatrix's property to her husband for life and provided that at his death—  
“the property is to be sold and divided as follows: Among my Brothers & Sisters children and David R. Neil and Andrew Neil, also Lulu Keith equally.”  
*Held*, that the three persons last named take equally with each of the nephews and nieces *per capita*.
2. *SAME—Evidence—Statements of Testatrix.* It was not error to exclude evidence of statements made by the testatrix to the scrivener, that she wanted each of the devisees to share equally with the others.

Appeal from Republic district court; JOHN C. HOGIN, judge.  
Opinion filed January 12, 1918. Modified.

*W. D. Vance*, and *R. E. McTaggart*, both of Belleville, for the appellants.

*N. J. Ward*, of Belleville, for the appellee.

The opinion of the court was delivered by

WEST, J.: This case involves the construction of a will; the question being whether certain devisees shall take by families or individually. The only error complained of, aside from the *per stirpes* construction, is the refusal to receive the evidence of the scrivener as to what the testatrix said her intentions and desires were concerning the interests of the devisees.

Jennet Neil married John Neil, and in December, 1877, a deed was made to them jointly for one tract of land now in controversy. Her husband died in 1879, and in 1881 she married his brother Daniel Neil, and afterwards acquired other land in addition to what she took as survivor of her first husband. She never had any children. Daniel's two nephews, David R. Neil and Andrew Neil, had lived in her home in early life, her husband having been their guardian. They were with her in her last sickness and were friendly with her

## Neil v. Stuart.

till the end. When she died she had brothers and sisters who had children, and one sister who had none. Only one sister, Mrs. Keith, lived in Kansas, and the others had never visited Jennet, at least not for many years. Mrs. Keith had a step-daughter, Lulu Keith Cooksey. The will was executed April 4, 1905, and gave the husband, Daniel Neil, a life estate in the land. Jennet died April 30, 1905. Daniel, who took under the will, died December 19, 1912. The will is in the following words:

## "LAST WILL AND TESTAMENT

"I, Jennet Neil of Courtland, Kansas, make this my last will.

"I give devise bequeath my estate and property both real & personal as follows that is to say to my dear husband Daniel Neil during his natural life time and at his death the property is to be sold and divided as follows: Among my Brothers & Sisters children and David R. Neil and Andrew Neil, also Lula Keith equally.

"I further bequeath unto Frances Peter Wilson, Herman Henry Wilson and George McBoyle the sum of One Dollar each.

"I further bequeath the money on my notes & mortggs as follows: \$500 to Daniel Neil my husband \$500 to Barbara Stewart [Stuart] \$500 to Mary Smith \$500 to Grace Smith \$500 to Isabell Keith

"In witness hereof I have signed and sealed and published and declared this instrument as my last will at Courtland, Kans., this 4th day of April, 1905.

JENNET NEIL.

"Subscribed to before me this 4th day of April, 1905.

(Seal)

J. E. TUCKER, N. P.

"My Commission expires March 3rd, 1906

"Harry Marty

"Simon J. Snider

Wits."

Does the will compel the construction adopted by the trial court, that the sisters' children take *per stirpes*? Was it error to reject the evidence of the testatrix's intention and desires? The case has been briefed with noteworthy ability by counsel on both sides, and each with persuasive reasoning and numerous citations seeks to substantiate his position. The rule which takes precedence over all the other rules of testamentary construction—many of them made venerable by time—is that the intention governs. When such intention appears by the use of apt language it is an end of all strife. What do these words naturally, technically, or intentionally mean?

"Among my Brothers & Sisters children and David R. Neil and Andrew Neil, also Lula Keith equally."

They must and do mean that David R., Andrew and Lula share equally with the children of the brothers and sisters, but are the children each to share equally with David and Andrew and Lula, or are all the children of each brother or sister or all the nephews and nieces together as a class thus to share? David and Andrew she knew and Lula she knew, but the children of the brothers and sisters the testatrix apparently did not know and certainly did not name. One conclusion to be drawn from the words used is that each brother or sister with children, each of the husband's nephews, and Isabelle's stepdaughter should be deemed an equal numerical divisor of the estate, the parts to equal the number of persons thus indicated. This view the trial court took.

But we still have the difficulty arising from the designation of certain children, the two nephews and one stepdaughter "among" whom the proceeds of the estate were to be "divided" and divided "equally."

Authorities may be found to uphold either the *per capita* or the *per stirpès* view. (40 Cyc. 1491-1497, and cases cited; 3 Words and Phrases, 2429-2431; Note, Ann. Cas. 1916C, 411.) But all these cases with the various textbooks strive for the same goal—the intention of the testator as expressed in the will. It would be unprofitable to array or quote decisions touching the various expressions used by testators and the meaning judicially derived therefrom, and it is sufficient to say that the majority of the court believe and hold that the most natural and the only proper construction to be given to the language now under consideration is that each nephew and niece of the testatrix was intended to share equally with the three other devisees, all to take *per capita*.

Having reached this conclusion, it follows that the rejection of the evidence of the notary public as to what the testatrix told him she wanted each of the devisees to have was not error.

From all the circumstances, Jennet Neil, in disposing of the property which came to her and her first husband jointly and that which was acquired by her and her second husband, brother of the former, had in mind the affection shown by both for their two nephews, although no blood relation to herself, and she naturally desired to take care of the children of her brothers and sisters for whom she felt a natural affection

whether their parents had visited her or not, and also a nearness to the stepdaughter of the one sister who lived here. It would not be deemed natural or reasonable, from any language found in the instrument or from any circumstances shown, to conclude that she wanted one of the nephews or nieces to have a greater or lesser share than any other, all of whom she must have had in mind when she directed that the proceeds of the property were to be divided among them and the other devisees "equally." If one sister should have five children at the death of the testatrix, and another, one, there is nothing to indicate that Jennet intended the one to have as much as the five. The language and circumstances indicate that she regarded her nephews and nieces, the one stepniece and the two nephews by marriage, as the equal objects of her benefaction, and this construction of the will is entirely reconcilable with the situation shown and the language used, which cannot without difficulty be given any other construction. It follows that while the ruling of the court in the exclusion of evidence was correct, the judgment as to the construction of the will was error.

The judgment is therefore modified accordingly, and the cause remanded for further proceedings in accordance herewith.

DAWSON, J. (dissenting) : I think the judgment of the trial court that the children of the brothers and sisters of the testatrix, unnamed and unknown by her, should take *per stirpes* and not *per capita* was correct and in harmony with well-considered precedents in analogous cases.

No. 21,181.

LEON BROQUET, *Appellee*, v. WILLIAM N. MOSIER and KATIE J. MOSIER, *Appellants*, et al.

## SYLLABUS BY THE COURT.

1. MORTGAGE FORECLOSURE—*Personal Service—Judgment by Default—Jurisdiction of Court.* In a foreclosure action, the district court has jurisdiction to render judgment by default on personal service without the notes and mortgage sued on being filed with the clerk or presented to the court.
2. SAME—*Original Papers Not Filed—No Fraud.* It is not a fraud on the defendants in a foreclosure action for the plaintiff to fail to file with the clerk or to present to the court the notes and mortgage sued on, or to fail to introduce any evidence in support of the petition, where personal service has been made and judgment is rendered by default.

Appeal from Rawlins district court; W. S. LANGMADE, judge. Opinion filed January 12, 1918. Affirmed.

M. A. Wilson, of Atwood, and J. B. Smith, of Beaver City, Neb., for the appellants.

Dempster Scott, and C. E. Scott, both of Atwood, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: On May 19, 1914, the plaintiff recovered a judgment against the defendants for \$863.30, and for the foreclosure of a mortgage on real property in Rawlins county. Summons had been personally served on each of the defendants. An order of sale was issued, the real property was sold, and a sheriff's deed to the purchaser was executed. On September 5, 1916, the defendants filed a motion to set aside the judgment, the order of sale, and the sheriff's deed, on the ground that the judgment was void for the reason that none of the notes or the mortgage sued on was filed with the clerk of the court nor with the judge thereof, and on the further ground that because no evidence was introduced to prove the allegations of the petition the court was without jurisdiction to render judgment. The motion was denied on November 13,

1916, and the defendants appeal from the judgment denying that motion.

1. The first argument presented by the defendants is that the court did not have jurisdiction to render judgment against them. This argument is based on the fact that the notes and mortgage sued on were not filed with the clerk nor presented to the court at the time judgment was rendered, nor at any time thereafter. The district courts of this state are courts of general jurisdiction; they have jurisdiction in actions to foreclose mortgages and, where personal service is had, may render judgment against any one who is personally liable on the mortgage debt. The evidence introduced in an action does not affect the jurisdiction of the court. The defendants' contention that the court did not have jurisdiction to render judgment is without any foundation.

2. Another proposition urged by the defendants is that the judgment was procured by fraud; this is based on the fact that the original notes and mortgage were not filed and were not introduced in evidence. Judgment was rendered against the defendants on their default. They did not answer, although they were personally served with summons. It must be presumed that the petition stated a cause of action. The defendants' motion indirectly stated that copies of the notes and mortgage were set out in the petition. Section 110 of the code of civil procedure reads, in part, as follows:

"In all actions, allegations of the execution of written instruments and indorsements thereon . . . shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." (Gen. Stat. 1915, § 7002.)

Section 129 of the code of civil procedure reads, in part, as follows:

"Every material allegation of the petition not controverted by the answer . . . shall for the purposes of the action be taken as true." (Gen. Stat. 1915, § 7021.)

By their default the defendants admitted that all the allegations of the plaintiff's petition were true. It was not necessary for the plaintiff to introduce any evidence in order to entitle him to judgment. In taking judgment by default without filing the original notes and mortgage with the court, or

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producing them to the court, the plaintiff did not practice any fraud whatever on the defendants.

The motion was properly denied, and the judgment is affirmed.

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No. 21,183.

GORDON DOTSON, *Appellee*, v. THE PROCTOR & GAMBLE MANUFACTURING COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

COMPENSATION ACT—*Injuries—Voluntary Settlement—Written Release—Inadequate Compensation.* The workmen's compensation act (Laws 1911, ch. 218, and amendments, Gen. Stat. 1915, § 5896, *et seq.*) recognizes the legality of a voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter; and, in the absence of fraud or mutual mistake, the satisfaction and release of such a claim, pursuant to such voluntary settlement, cannot be set aside on the ground of gross inadequacy of compensation, following *Odrowski v. Swift & Co.*, 99 Kan. 163, 162 Pac. 268; *Weathers v. Bridge Co.*, 99 Kan. 632, 162 Pac. 957.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed January 12, 1918. Reversed.

*J. K. Cubbison*, and *William G. Holt*, both of Kansas City, for the appellant.

*T. A. Milton*, *C. W. Prince*, *E. A. Harris*, *J. N. Beery*, and *J. E. Westfall*, all of Kansas City, Mo., for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff, while employed by the defendant as a workman, received an accidental injury to his eyes. He received some medical attention from defendant's physician, and later he was paid the sum of \$44.40 by defendant's cashier, L. A. Wickliffe, pursuant to the terms of a written instrument, which reads as follows:

"RELEASE.

"I, Gordon Dotson, of Kansas City, in the County of Wyandotte, and the State of Kansas, being of full age, in consideration of forty-four and

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$\frac{49}{100}$  dollars (\$44.40) and all medical fees to date to me paid by The Proctor & Gamble Manufacturing Company of Kansas City, Kansas, the receipt of which is hereby acknowledged, do hereby release and forever discharge the said The Proctor & Gamble Manufacturing Company from any and all claims, demands, actions and causes of actions of every name and nature which I now have or might have upon or against said The Proctor & Gamble Manufacturing Company and especially from all claims arising out of any and all personal injuries, damages, expenses and any loss or damage whatsoever, resulting or to result from an accident to me on or about the 28th day of October, 1915.

"It is distinctly understood and agreed that future employment forms no part of the consideration for this release whatever. . . .

(Signed) GORDON DOTSON.

"I further state that no false statements of any kind were made to me and no inducements held out to me and I rely on no statements whatever in making this release and especially state that I do not rely on any statements made to me by any physician or surgeon concerning my condition.

"Witnessed by

(Signed) GORDON DOTSON.

(Signed) J. E. O'NEILL.

(Signed) GEO. S. MCKEE.

"We hereby certify that the above and foregoing agreement was read to Gordon Dotson in our presence and he stated in our presence that he understood the conditions of said agreement and the statements contained therein.

(Signed) J. E. O'NEILL.

(Signed) GEO. S. MCKEE."

[Followed by notary's certificate.]

Some time later plaintiff filed this action, setting up his injuries received while employed in a soap factory belonging to defendant, and reciting the pertinent facts, and alleging that both he and defendant were subject to the terms of the workmen's compensation act. He further alleged:

"Plaintiff further states that the said defendant has not made any agreement of settlement with the plaintiff, and that plaintiff has not offered or tendered any settlement concerning the amount of damages sustained by the plaintiff."

Defendant's answer pleaded satisfaction and release in accordance with the written instrument set out above. Plaintiff's reply alleged that the document read to him, and which he signed, purported to be a receipt for moneys paid to him for wages, and that he signed it on that understanding; and plaintiff denied that the document read to him was a release of all demands, and that he was defrauded and misled into signing it, and—

"Plaintiff further avers that said amount so paid plaintiff as afore-



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said is utterly inadequate to operate as a legal satisfaction of plaintiff's claim."

The jury's general verdict was in favor of plaintiff, and judgment was entered in his behalf. The jury answered certain special questions submitted by the court:

"3. Did Mr. Wyckliffe make any false statements to plaintiff at the time of signing the release? No.

"5. Did Mr. Wyckliffe at the time of signing the release commit any act of fraud in order to procure the release? No.

"7. Was the release and all parts of it read to the plaintiff before he signed it? Yes."

The appellant chiefly complains of one of the instructions given by the court, and of the overruling of its motion for judgment on the special findings.

The criticised instruction reads:

"6. If you find from the preponderance of the evidence that said release was obtained by means of false representations, substantially as alleged in plaintiff's reply, or that the consideration thereof was grossly inadequate as compensation for the injuries sustained by plaintiff while in defendant's employ, then it will be your duty to determine whether or not the plaintiff was wholly or partially incapacitated from work as the result of the injury so received while in defendant's employ."

In justice to the trial court it should be mentioned that the decisions of this court on this point, *Odrowski v. Swift & Co.*, 99 Kan. 163, 162 Pac. 268, and *Weathers v. Bridge Co.*, 99 Kan. 632, 162 Pac. 957, were not handed down until after the instant case was tried below. In the *Odrowski* case it was distinctly declared that a voluntary settlement, release, and satisfaction of an injured workman's claim against his employer under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer to effect such settlement and release. While the rights of injured workmen and the liabilities of their non-culpable employers are defined by the statute, and certain modes of determining compensation for workmen's injuries are prescribed therein, those statutory modes of agreements and awards are not exclusive. Workmen are not in any respect under guardianship or other disability; they and their employers are free agents; they may release their employers from liability for injuries on any agreed terms satisfactory to both (*Coppage v. Kansas*, 236 U. S. 1); and where no fraud

has been practiced on the workman or on his employer, and no mutual mistake inheres in the contracts of settlement and release, the courts are bound to respect and enforce the settlements made by the parties, and are powerless to disturb such contracts of settlement. This subject was fully covered in the *Odrowski* case, and also in *Weathers v. Bridge Co.*, supra. It must therefore be held that the instruction given did not correctly state the law. In this case it would have required proof of fraud in addition to the mere inadequacy of compensation to vitiate the settlement and release—not simply a finding of inadequacy of the sum settled for. The instruction that a finding of fraud or inadequacy of compensation would warrant a verdict for plaintiff was erroneous. Appellee cites section 29 of the workmen's compensation act (Laws 1911, ch. 218, § 29, Gen. Stat. 1915, § 5923), which provides how the agreements and awards made in conformity with the act may be canceled. The section relates to the statutory agreements and awards made in conformity with the act, and is not pertinent here. The act recognizes the propriety, or legitimacy, of releases under ordinary principles of contracts, aside from the "agreements" and "awards" defined and regulated by the statute. (Gen. Stat. 1915, §§ 5917, 5922; *Odrowski v. Swift & Co.*, supra.) Appellee says that the release at issue is one at common law. That contention is partly correct. It was probably drawn with sufficient precision and comprehensiveness to satisfy the exactitudes of the common law, but it also shows incontestably that it was drawn to compose, satisfy, and release the very claim involved in this action; and it was duly filed in the office of the clerk of the district court, so the case of *Rodarmel v. Salt Co.*, 101 Kan. 141, 165 Pac. 668, is not pertinent. In *Weathers v. Bridge Co.*, supra, this court was able to give the injured workman another chance, by remanding his cause with instructions to permit him to amend his pleadings to show a mutual mistake of fact. Here, however, the findings of fact show that there was neither fraud nor mutual mistake. This conclusion requires that the judgment be reversed, and the cause remanded with instructions to enter judgment for defendant on the jury's special findings of fact. It is so ordered.

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Sheahan v. Kansas City.

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No. 21,186.

C. C. SHEAHAN et al., *Appellants*, v. THE CITY OF KANSAS CITY, *Appellee*.

## SYLLABUS BY THE COURT.

1. *APPEAL—Demurrer to Evidence Sustained—Time in Which to Appeal.* To review a ruling of the court sustaining a demurrer to plaintiff's evidence and giving judgment for the defendant it is necessary that the appeal be taken within six months after the ruling is made, and the filing of a motion for a new trial does not operate to extend the time for such appeal.
2. *NEW TRIAL—Newly Discovered Evidence—Cumulative.* A party is not entitled to a new trial on the ground of newly discovered evidence, where the new evidence is of the same kind and goes to the same point as that offered on the trial.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed January 12, 1918. Affirmed.

*J. K. Cubbison*, and *William G. Holt*, both of Kansas City, for the appellants.

*H. J. Smith*, *Lee Judy*, and *Thomas M. Van Cleave*, all of Kansas City, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by C. C. Sheahan and his wife, Mary Sheahan, against Kansas City to recover for the death of a daughter. It appears that she was drowned in a pool of a creek bed just east of a bridge in a public street which extended across the creek. The city had used girders to tie the abutments of the bridge together, and it is claimed these operated as a dam, resulting in the formation of the pool. This, it is alleged, constituted an attractive nuisance; that children frequently played there; and that the daughter of plaintiffs was attracted to it, and while playing there lost her footing and was drowned. After the plaintiffs had offered their evidence a demurrer thereto was sustained and, no request being made to open the case for additional evidence, the court on March 30, 1916, gave judgment for the defendant. On the fol-

lowing day a motion for a new trial was made upon the ground, among others, of newly discovered evidence. This motion was not decided until September 16, 1916, when it was overruled. This appeal was taken on December 14, 1916, considerably more than six months after the ruling on the demurrer and the rendition of judgment.

Defendant contends that the appeal was taken too late to obtain a review of the decision sustaining the demurrer to the evidence. It has been determined that a demurrer to the evidence raises nothing but a question of law. (*Wagner v. Railway Co.*, 73 Kan. 283, 85 Pac. 299.) To review such a ruling "a motion for a new trial is neither necessary nor proper, and the fact that such a motion is filed will not enlarge the time within which a case may be made upon which to review the ruling on the demurrer." (*White v. Railway Co.*, 74 Kan. 778, syl. ¶ 2, 88 Pac. 54; see, also, *Van Tuyl v. Morrow*, 77 Kan. 849, 92 Pac. 303; *Bowen v. Wilson*, 93 Kan. 351, 144 Pac. 251.) The error assigned on the ruling sustaining the demurrer to the evidence is therefore not open to review, as the appeal was not perfected within six months after the ruling was made.

The overruling of the motion for a new trial occurred within the time limited for an appeal, and it may be considered. Only one ground is relied upon—that of newly discovered evidence to be given by a witness named Corlew. The proposed new evidence goes no further than to state the location of the pool; that the children were attracted to and frequently played near it; that the body of Katherine, the child drowned, was taken out of the pool within the limits of the street; and that he had heard Katherine say to another: "Let's go down and play on the dam under the bridge," and shortly afterwards he was told that the girl had fallen into the water. There was much testimony given at the trial as to the location of the pool, as to the place where Katherine fell into the water and was drowned; and also that children were attracted to the place and frequently played there. Testimony of the girl who was playing with Katherine at the time of the accident was received, and also of a witness who took Katherine's body from the pool. He gave the details as to the conditions at the place of the drowning, the finding and recovery of the body, and mentioned the fact that Corlew, the proposed witness, was present when the body

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Ott v. Railway Co.

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was recovered. It is clear that the proposed evidence, if new, is of the same kind and goes to the same point as that adduced at the trial, and adds very little to its strength. It is purely cumulative in character, and that kind of testimony is not a sufficient ground upon which to base a ruling granting a new trial. (*Clark v. Norman*, 24 Kan. 515; *Baughman, Sheriff, v. Penn*, 33 Kan. 504, 6 Pac. 890; *Brown v. Wheeler*, 62 Kan. 676, 64 Pac. 594.)

It follows, therefore, that the judgment of the district court must be affirmed.

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No. 21,191.

LEONARD OTT, *Appellee*, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. **SHIPPING CATTLE—Delay in Transportation—Shipper Not Notified of Conditions—Damages.** In an action for damages for delay in transporting cattle, the court instructed the jury that if, when the cattle were tendered for shipment, the defendant knew of conditions likely to cause delay in transportation, and the shipper did not, the defendant should have informed the shipper of the conditions, in order to excuse liability for delay which the conditions occasioned. *Held*, the instruction stated the law, and was appropriate to the issues.
2. **SAME—Notice of Loss or Injury.** The contract of shipment required notice of loss or injury during transportation or at loading or unloading places on the carrier's road. *Held*, the contract was concluded with delivery, and notice of loss occurring after delivery was not necessary.

Appeal from Barber district court; GEORGE L. HAY, judge. Opinion filed January 12, 1918. Affirmed.

*William R. Smith, Owen J. Wood, and Alfred A. Scott*, all of Topeka, for the appellant.

*Samuel Griffin, and Seward I. Field*, both of Medicine Lodge, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one for damages resulting from delay in the transportation of live stock. The plaintiff recovered and the defendant appeals.

The plaintiff's claim was stated in a bill of particulars filed with a justice of the peace. The defendant filed no pleadings. In the district court delay in transportation was proved by the plaintiff and admitted by one of the defendant's chief witnesses. There was, in fact, no controversy over the subject, and the defendant merely undertook to excuse the delay. The excuse was, an act of God. The testimony was that an unprecedented flood destroyed the bridge by which the defendant reached the Kansas City stockyards, the destination of the cattle. Other railroad bridges in the vicinity were destroyed at the same time, so that several carriers were obliged to use a single track to make deliveries. This resulted in a congestion of traffic, causing unavoidable delay. Sometimes, depending on the number of cars detoured, a shipment would reach the stockyards without delay. The plaintiff testified that the defendant's bridge was washed away more than two weeks before he tendered his cattle for transportation, and that the defendant did not inform him of the resulting conditions.

The court instructed the jury that if, when the cattle were tendered for shipment, the defendant knew of conditions likely to cause delay in transportation, and the shipper did not, the defendant should have informed the shipper of the conditions, in order to excuse liability for delay which the conditions occasioned. The defendant complains of the instruction. It correctly stated the law (10 C. J. 290, § 412), and was appropriate to the issue raised by the testimony referred to.

The delay in transportation occasioned loss through shrinkage of the cattle before delivery at destination, and after delivery. Notice of loss was not given. The contract of shipment required notice of loss or injury during transportation or at loading or unloading places on the defendant's road. The court instructed the jury that no damages could be allowed for loss occurring before delivery, but that notice of loss after transportation ended was not necessary. The defendant complains of the latter part of the instruction. The instruction was based upon a proper interpretation of the contract, which concluded with delivery. Extra yardage and extra feed, necessary after transportation ended, belong in the same category with shrinkage of the cattle after transportation ended. Notice of loss of market was not required by the contract.

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Catlin v. Deering & Co.

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The jury returned some special findings of fact, which it is said are incompatible with the general verdict, are inconsistent with each other, and are not responsive to the issues. A careful scrutiny of the abstract fails to disclose that these questions were presented to the district court.

The judgment of the district court is affirmed.

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No. 21,192.

MINERVA CATLIN, *Appellant*, v. WILLIAM DEERING & COMPANY  
et al., *Appellees*.

SYLLABUS BY THE COURT.

1. MORTGAGE FORECLOSURE—*Irregularities in Sheriff's Sale—Sale Confirmed—Sheriff's Deed Not Open to Attack.* Mere irregularities in the conduct of a sheriff's sale of real estate, such as the omission to cause an appraisement where that is required, or the failure to name an hour in the notice of the sale, can afford no basis for an attack upon the sheriff's deed after a decree of confirmation has been rendered from which no appeal has been taken.
2. SAME—*Sheriff's Sale—Valid Order of Sale—Void Execution.* A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final the title of the purchaser is not open to attack on the ground of the invalidity of the execution.
3. SAME—*Sheriff's Deed—Title of Grantee Not Open to Attack.* Where a sheriff's sale of real estate, made under an order of sale based on the foreclosure of a mortgage, and also under an execution, has been confirmed, and after the expiration of the period of redemption a deed has been executed, the title of the grantee is not open to attack on the ground that the land sold was occupied as a homestead and was therefore exempt from sale on a general execution.

Appeal from Barber district court; GEORGE L. HAY, judge.  
Opinion filed January 12, 1918. Affirmed.

G. M. Martin, of Medicine Lodge, for the appellant.

A. L. Noble, of Winfield, J. N. Tincher, and Seward I. Field,  
both of Medicine Lodge, for the appellees.

The opinion of the court was delivered by

MASON, J.: On December 29, 1915, Minerva Catlin brought an action to set aside a sheriff's deed and all the proceedings on which it was based. She was denied relief, and appeals.

She was formerly the owner of the land involved, which is situated in Barber county. A mortgage upon it was foreclosed, and on December 22, 1913, the property was sold by the sheriff of that county under an order of sale based on the decree in the foreclosure case, and also under a purported execution issued by the clerk of the district court of that county, but based upon a judgment rendered against Mrs. Catlin in Kingman county. The grounds upon which the plaintiff asks to have the deed set aside are: (a) that the sale was made without appraisalment; (b) that the notice of the sale failed to state the time of day at which it would be held; (c) that the execution was a nullity because it was not issued out of the court where the judgment was rendered; and (d) that the property was occupied as a homestead and was therefore exempt from sale on a general execution.

1. The statute no longer requires an appraisalment where land is sold on execution. (*Armstead v. Jones*, 71 Kan. 142, 80 Pac. 56; *Insurance Co. v. Carra*, 101 Kan. 352, 166 Pac. 233.) Moreover, any omission in that regard, as well as any defect in the notice of sale, is now immaterial, because a confirmation has been had and no appeal has been taken therefrom. That sets at rest all disputes of fact or law which are involved therein, save such as go to the question of jurisdiction. (*Carter v. Hyatt*, 76 Kan. 304, 91 Pac. 61; *Clark v. Tandy*, 101 Kan. 328, 167 Pac. 1039.)

2. An attested copy of the journal entry of the Kingman county judgment was filed in the office of the clerk of the district court of Barber county. This made the judgment a lien upon real estate of the debtor in that county, but an execution thereon could only be issued by the clerk of the district court of Kingman county. (Gen. Stat. 1915, § 7320.) The sale having been made upon two writs, one of which was valid, was not a nullity. The confirmation cured all mere irregularities, and the title passed by the sheriff's deed. (17 Cyc. 1308; 10 R. C. L. 1333; 3 Freeman on Executions, 3d ed., § 325.) So far as the passing of title was concerned, the sale was not affected by the existence of the void execution. If any prejudice resulted to the owner from the sale having been made in part under color of the execution, this would have afforded a



basis for resisting the confirmation, but not for attacking the title after the execution of a deed. Any question as to the amount required to effect a redemption would really be one concerning the distribution of the proceeds of the sale, which is not a matter to be considered in this proceeding.

3. No question of exemption appears to have been raised at the time the sale was confirmed. But after the confirmation, and after the period allowed for redemption had expired, a writ of assistance was asked against Mrs. Catlin. She opposed the application on various grounds, one of them being that the property was her homestead, and therefore was exempt from sale under the execution. The writ was allowed and no appeal was taken. If the question of exemption were one that could be raised by an attack upon the validity of the sale, it would seem to have been adjudicated by the order granting the writ of assistance, which is appealable (5 C. J. 1327; 2 R. C. L. 739, 740), and while not always conclusive (*Lundstrum v. Branson*, 92 Kan. 78, 139 Pac. 1172), is so as to matters properly litigated. (5 C. J. 1325, 1326.) But as has already been said, the sale must stand by virtue of being based upon the order of sale issued under the decree in the foreclosure case, even though the execution was absolutely void. The title and right of possession have passed to the purchaser, whether the land was occupied as a homestead or not. The question whether the land was exempt from sale on execution, like the question whether the purported execution had any validity, could only affect the disposition of the proceeds of the sale over and above the amount of the mortgage debt—a matter that cannot be inquired into in this proceeding, which is an attack on the title to the land.

The judgment is affirmed.

No. 21,193.

**THE STUDEBAKER CORPORATION, Appellant, v. W. J. BELL, Appellee, et al.****SYLLABUS BY THE COURT.****PROMISSORY NOTE—Defense of Payment—Evidence—Finding—Agency.**

In an action on a promissory note executed by defendant as principal and two others as sureties, the answer pleaded payment to the sureties and that they were agents of the payee and authorized to receive payment. *Held*, that the finding upon which the judgment in favor of the defendant rests is contrary to the evidence and the undisputed facts.

Appeal from Lyon district court: **WILLIAM C. HARRIS**, judge. Opinion filed January 12, 1918. Reversed.

*W. S. Kretsinger*, of Emporia, for the appellant.

*W. L. Huggins*, and *O. T. Atherton*, both of Emporia, for the appellee.

The opinion of the court was delivered by

**PORTER, J.:** The Studebaker Corporation appeals from a judgment against it for costs in an action on a promissory note executed by the appellee, *W. J. Bell*, as principal, and *W. Kurt* and *Gary Wilson* as sureties. The note was given as part payment for an automobile purchased by *Bell* from the appellant. *Bell* answered that he had paid the note to *Kurt* and *Wilson*, agents of appellant with authority to collect the note. The case was tried by the court and findings made, in substance, that the firm of *Kurt* and *Wilson* was appellant's agent and authorized to receive payment of the note.

The sole contention of appellant is that there was no evidence to support these findings, and that judgment should have been rendered against *Bell* for the amount of the note and interest.

The appellant is engaged in the manufacture and sale of automobiles, its principal place of business being at South Bend, Ind., and it maintains a branch office at Kansas City, Mo. At the time the note was executed *Kurt* and *Wilson* were partners in business at Emporia, and were selling the appel-

lant's automobiles under a written contract called a "dealer's agreement," which granted to them the right to sell Studebaker automobiles in certain prescribed territory during the life of the contract. The dealer was required to pay cash upon delivery of the automobiles at the regular list price, less certain trade discounts allowed. The title to the automobiles and parts furnished the dealer was to remain in the company until the goods were fully paid for. Kurt and Wilson agreed not to deal in new automobiles not sold by appellant in such manner as in the judgment of appellant would prejudice the sale or reputation of its automobiles. There was a provision in the contract to the effect that the dealer should in no way be the legal representative or agent of the company. The contract gave Kurt and Wilson authority to appoint a subdealer in any one of six designated towns, but they were made responsible to the appellant for all acts of any subdealer appointed by them. W. J. Bell lived at Americus and was engaged in the grocery business. Kurt and Wilson arranged through him to sell automobiles and to allow him part of the discount given by the appellant. Americus is not one of the places named in the contract at which Kurt and Wilson were authorized to appoint a subdealer, but the evidence shows that appellant knew they were selling cars through Bell and recognized him as a subdealer.

The appellee, Bell, testified that Kurt and Wilson made an arrangement by which he sold automobiles for them to such customers as he could find in his locality. His testimony was, "If I sold a car I came down and got it of Kurt and Wilson and sold it to my customer, and when the customer paid me the money was mine"; that this was the extent of his connection with Kurt and Wilson. He further testified that the note sued on is the only one he ever signed; that he was unable to get this note from Kurt and Wilson when he paid them the money, but kept insisting upon their getting it for him; he finally wrote to the Studebaker company and asked them if they had it and learned from them that they had. It was the only car he ever bought without paying cash for it.

Kurt, who was a witness for the appellee, testified that the way in which the firm of Kurt and Wilson carried on business with the appellant was, that if they wanted a car they had to

buy it from the Studebaker people and then sell it to some customer; that Bell paid the amount of the note to him shortly before it was due; that his firm had never made any other collections for the appellant; that in one other instance where a note was taken in payment for a car the note was sent by the appellant to the local bank and the maker notified to pay it there; that the reason the note was taken payable to the Studebaker company was because the firm had to sign the note with Bell. He knew the note was made payable in Kansas City. He was asked what direction, if any, he had from the branch house at Kansas City with reference to this Bell transaction, and said that a traveling representative of the appellant, named Wollington, came to his office in Emporia and made out the notes which were to be executed in payment for Bell's car. Asked what Wollington said, he answered:

"The representative made out these notes, the Bell note, and we signed it, and he said, 'Bell is dealing under you folks. He is your subdealer. All his transactions is done through you,' for him being our subdealer, he would have to do his transactions through us. That is the way this collection was made. When Bell paid us he was doing his business through us instead of through the company. We made that collection."

On cross-examination he testified:

"Q. Now, then, you say that Wollington told you to collect this money? A. Well, he told us that all of Bell's transactions was through us.

"Q. Is that what he said? A. That's what he said."

He was recalled by the appellee and asked the following question:

"I did understand you to say that the man that made out the note was the one that told you that you was to collect that from Bell and they looked to you for it. A. That's right."

He was again cross-examined, and the substance of his testimony is given in the following questions and answers:

"Q. Now, I understand now, Mr. Kurt, that during that conversation there was not anything said about you collecting this particular note from Bell? A. Well, now, I can't say just exactly on that but I think it included that.

"Q. That is simply your opinion that it did include that but do you remember anything said about you having to collect this note? A. No, I would not say that I remember of anything said definite about that note. I said at the time he made the notes out that he mentioned—or spoke to him [me] about the dealings with Bell, and he said all the transactions as between you and Bell; this Bell, we don't know each other."

The court overruled a demurrer to the appellee's evidence. The appellant's evidence in rebuttal was given in the form of depositions. The treasurer of the appellant testified that Kurt and Wilson had no authority to accept payment of the note. Coleman McNulty testified that on the 3d of February, 1915, he was salesman for the Studebaker company and his territory then included the city of Emporia; that he served there from January, 1915, until August 12 of that year; he was preceded in that territory or "block" by Iver Schmidt and followed by L. S. Wollington; that Wollington commenced in that district on the 12th of August, 1915. He denied having any conversation with Kurt or Wilson at Emporia concerning the collection of the note or payment of the same. He further testified that he had no authority to make oral or written agreements concerning the collection of money due the corporation for the sale of automobiles. J. W. Lytle, an employee of the appellant in the traffic department at the Kansas City branch, testified that the note sued on was drawn up by himself in the office of the company at Kansas City. Appellant's cashier testified that L. S. Wollington was put on the Emporia territory in July or August, 1915, and had not made that territory before; also, that the note sued on was drawn up in the office at Kansas City by J. W. Lytle, and was sent to the Emporia State Bank to be signed. He denied that Kurt and Wilson, or either of them, had any authority to collect from Bell the amount due on the note.

The court made the following finding of fact:

"The court further finds from the evidence that the said defendant, W. J. Bell, at or about the time of the maturity of said note paid the same by paying to the said Gary Wilson and William Kurt, who were at said time a partnership and as such partnership were the local agents of the said plaintiff, through whom the said W. J. Bell had theretofore transacted his business with said plaintiff."

Upon this finding the court based the further finding that Kurt and Wilson were the agents of appellant, and held as a matter of law that the payment to them satisfied the note.

In our opinion it is very doubtful if there is any evidence to sustain the finding that Kurt and Wilson were agents of appellant at all, or that they had any authority other than to deal in automobiles in the manner specified in the contract. How-

ever, aside from this part of the findings, there is nothing in the evidence to sustain the finding that when Bell made the payment to Kurt and Wilson they were the local agents of the appellant "through whom the said W. J. Bell had theretofore transacted his business with" the appellant. We are unable to find, in the record, evidence showing that prior to the payment Bell ever transacted any business with appellant, except to purchase the one car and to execute the notes in payment therefor. On the contrary, the undisputed evidence is, that he bought cars direct from Kurt and Wilson, paid for them in cash, sold them to customers of his own, and when they paid him for the cars, the money belonged to him. In these transactions he had no dealings with the appellant; nor does he claim to have had. His testimony as to this car is, that he went to Kansas City and purchased it from the branch house. Kurt was with him, and presumably the firm of Kurt and Wilson got the benefit of a dealer's commission. The utmost that can be said for the testimony of Kurt with respect to the conversation with Wollington is, that he was inclined to think it referred to and included this note; but he states the substance of the conversation from which it is apparent that nothing was said about the note nor about collections, and that it referred only to transactions between Bell as subdealer and Kurt and Wilson. Again and again the witness declared that the note was not mentioned. Each time that he is asked to give the conversation, he states that the substance of what Wollington said was, that the Studebaker company had no dealings with Bell in the purchase of cars; that Bell was not the agent of the appellant, but a subdealer under Kurt and Wilson, and in all transactions between them Bell was to pay them. The purchase of the car and the giving of the note was not a transaction between Bell on the one side and Kurt and Wilson on the other. That was a transaction in which Bell, Kurt, and Wilson were the makers of a promissory note, and the Studebaker corporation was the payee. Moreover, the evidence shows that Kurt and Wilson never made collections for the appellant, and that in the only other instance where a note was taken in payment for an automobile, the appellant sent the note for collection to the local bank and it was paid there.

The provision in the contract that the dealer was in no way

the legal representative or agent of the company, and had no right or authority from it to assume any obligation on its behalf or to bind it in any manner, expressed the intention of the parties and cannot be wholly ignored. *Prima facie* it stated the relation between the parties. No reason is perceived why the contract should not control, unless it was afterwards altered, or unless the appellant is in some way estopped by its conduct from relying upon the terms of the contract. Of course, the law is well settled that notwithstanding the express terms of the contract, if appellant by its course of dealing with Kurt and Wilson held the latter out to the public or to Bell as its agent to collect the note, then the courts would ignore the provision and hold appellant estopped to deny the agency. Now what particular conduct of the appellant, or course of dealing by it with Kurt and Wilson, is shown, upon which an estoppel can be predicated? The trial court seems to have concluded that appellant was estopped to deny the authority of Kurt and Wilson to receive payment of the note, because through them Bell "had theretofore transacted his business with" appellant. As already shown, the undisputed evidence is, that Bell had no transactions or dealings with the appellant save and except the purchase of this one car for which he gave the note sued on; and further, that he cannot base any estoppel on the conversation between Wollington and Kurt for he was not present, and is not shown to have had any notice or knowledge of the conversation prior to the time he made his payments. These facts, together with the undisputed testimony that Kurt and Wilson had never received payments on promissory notes belonging to the appellant, and had never made collections for it, leave no foundation for the operation of estoppel. There was nothing shown in the evidence to overcome the written contract defining the limits of the authority of Kurt and Wilson.

The note was payable at Kansas City to the order of the Studebaker corporation. Bell was the principal and Kurt and Wilson were sureties; the note was not in their possession, and Bell knew these facts. Where payment is relied on as a defense to an action on a promissory note, and it is sought to show the agency of a comaker to collect for the principal, especially where the note is not in the hands of the other maker, the evi-

dence to establish authority to receive payment should be clear and convincing, because such a proceeding is opposed to the usual course of business in transactions relating to promissory notes. Such agency ought not to be assumed from the character of the testimony given by Kurt, to the effect that he thought the conversation related to the note. Since the court based the conclusion of law, that agency was established, upon a finding that the appellee had transacted his other business with the appellant through the same parties, which is not sustained by any evidence, it follows that the judgment must be reversed with directions to render judgment against the appellee.

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No. 21,194.

THE EMPIRE CREAM SEPARATOR COMPANY, *Appellant*, v.  
FRANK C. ABBOTT, *Appellee*.

SYLLABUS BY THE COURT.

SALE—*Mechanical Milker—Evidence—Findings.* Evidence and findings examined, and the latter are held not to be inconsistent or unsupported.

Appeal from Riley district court; FRED R. SMITH, judge.  
Opinion filed January 12, 1918. Affirmed.

*R. P. Evans*, and *George Clammer*, both of Manhattan, for the appellant.

*C. B. Daughters*, of Manhattan, for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued to recover the purchase price of a milk separator and a mechanical milker sold to the defendant. No complaint was made of the separator, but it was pleaded that the milker injured his cows, and also damaged the defendant by the decrease in the amount of milk the cows gave, all in the sum of \$250, the price of the milker being \$163.

The one assignment of error is that the court erred in refusing a new trial, the motion for which set up inconsistency between the verdict and the findings, and that the latter were unintelligible and unsupported by the evidence.



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The State, *ex rel.*, v. Insurance Co.

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The meat of the plaintiff's contention is that the evidence was not sufficient to show that the alleged damage by the loss of milk was caused by the machine, and that from the testimony the amount of damages allowed by the jury could not be ascertained. But an examination of the abstract and counter-abstract convinces us that the result reached by the triers of fact was fairly supported, and that the amount allowed the defendant was fully justified by the evidence.

We perceive no material inconsistency between the findings, or between them and the general verdict.

The judgment is therefore affirmed.

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No. 21,209.

THE STATE OF KANSAS, *ex rel.* S. M. BREWSTER, as Attorney-general, etc., *Appellee*, v. THE TOPEKA NATIONAL LIVE STOCK INSURANCE COMPANY et al., *Appellees*, (JAMES BURNS, Intervenor, *Appellant*).

SYLLABUS BY THE COURT.

CONTRACT—*Employment by State Insurance Agent—State Agent Personally Liable.* Where one contracts with the state agent of an insurance company to render service for the agent, and renders such service under the contract, the contractor must look to the agent for his compensation.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed January 12, 1918. Affirmed.

D. R. Hite, of Topeka, for the appellant.

Z. T. Hazen, of Topeka, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: On December 27, 1915, the state of Kansas brought this action to oust The Topeka National Live Stock Insurance Company, The Central National Mutual Hail Insurance Company, and other insurance companies from doing business in the state.

A receiver was appointed for all the insurance companies, and took charge of their property. Afterward, James Burns

intervened in the action and filed a petition therein. In that petition Burns alleged that there was \$1,725 due him for services rendered by him for The Central National Mutual Hail Insurance Company under a contract between himself and J. H. White, state agent for that company.

Trial was had on the intervening petition, evidence was introduced, and special findings of fact and conclusions of law were made. The evidence has not been abstracted. The material parts of the findings of fact were as follows:

"On the 4th day of January, 1915, the claimant herein, James Burns, entered into a contract with The White Agency. . . .

"The claim of James Burns herein is based upon the contract marked Exhibit B [the contract above referred to] and whatever services or commissions he may have earned are for services and commissions rendered under said contract. That at the time of the making of said contract J. H. White was doing business under the name of The White Agency which consisted of J. H. White. That The White Agency had rooms and offices in connection with the above insurance company.

"That the services rendered by the claimant herein sued for were rendered by him for The White Agency under the contract heretofore mentioned as Exhibit B, and the effect of which was to help swell the business of said insurance company, and for which services under said contract, Exhibit B, J. H. White or The White Agency were liable."

Other findings of fact were made, but they were consistent with and supported, rather than modified or changed, the findings above set out.

The conclusions of law were as follows:

"James Burns, claimant herein, was in the employ of The White Agency and the services sued for herein were performed for said White Agency and not for the Central National Mutual Hail Insurance Company.

"That there is due the said James Burns from The White Agency for the services sued for herein the sum of \$1,441.01.

"That the defendant The Central National Mutual Hail Insurance Company is entitled to judgment for its costs herein expended."

The court rendered judgment in favor of the insurance company and of Clay Hamilton, receiver. James Burns appeals. He cites *Edwards v. Gildemeister*, 61 Kan. 141, 59 Pac. 259, and quotes therefrom as follows:

"A contract executed by an authorized agent in his own name, but in fact in behalf of his principal, is the contract of the principal, and suit may be brought against him to enforce its provisions." (Syl. ¶ 2.)

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The difficulty with the position taken by Mr. Burns is that in the Edwards case the contract was made in behalf of the principal, while in the present case the contract was made, not in behalf of the insurance company, but with The White Agency in its own behalf, and the services rendered by Burns were rendered for the agency. The findings conclude the argument. They leave nothing further to be said. Under them the judgment that was rendered was the only one that could be rendered. Burns must look to his employer for compensation.

The judgment is affirmed.

DAWSON, J. Not sitting.

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No. 21,211.

C. E. WILLIAMS, *Appellee*, v. THE IOLA ELECTRIC RAILROAD COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. **AUTOMOBILE—Crossing Railroad—Trolley Car Violating Speed Ordinance—Negligence.** A breach of a speed ordinance of a city by an interurban trolley car is negligence *per se*; but to subject the owner of the trolley car to liability for the violation of the city ordinance, in a damage suit by a private litigant, it must appear that the disobedience of the ordinance caused or aggravated the damages.
2. **SAME—Railroad Crossing—Obstructions to View—Duty of Driver.** It is not required in this state in all cases that one about to cross a railway track must stop, look and listen to assure himself that he can cross in safety; but where obstructions to his view prevent him from otherwise ascertaining the fact of safety, then it is his duty to stop to make sure of his safety before crossing.
3. **SAME.** Rule followed that a driver of an automobile cannot recover damages for injury to himself and his machine in a collision with a trolley car occasioned by the driver's attempt to cross a railway track without stopping to ascertain that he could cross in safety, when, owing to obstructions to his view, that fact could not have been otherwise ascertained.
4. **SAME—Railroad Crossing—Obstructions to View—Failure to "Stop, Look and Listen"—Contributory Negligence.** Plaintiff was driving his automobile along a public street and approached a railway crossing, but owing to obstructions to his view he could not ascertain whether there was any car coming on the railway track, and he did not stop to

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ascertain that fact. At fifteen feet from the track nothing prevented him from seeing an approaching car, but he did not see it until the front end of his automobile was eight feet from the track, and he was then unable to stop his automobile in time to prevent a collision. *Held*, that plaintiff was guilty of such contributory negligence as will bar a recovery of damages against the trolley-car company.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed January 12, 1918. Reversed.

*Altes H. Campbell*, of Iola, for the appellant.

*F. J. Oyler*, of Iola, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This case presents the usual consequences which arise when an automobile and a trolley car arrive at the same place at the same time.

The plaintiff was driving his automobile southward on Martin street in Gas city. An interurban passenger car belonging to defendant was running eastward on its car line, which crosses Martin street at right angles. A high embankment on the north side of the car line, with high weeds and grass growing thereon, obscured the car from plaintiff's view, and a collision occurred at the crossing; the plaintiff was injured and his automobile was damaged. Hence this lawsuit.

Plaintiff's petition charged defendant with various acts of negligence:

"That the defendant was careless, negligent and reckless in the commission of the injuries and damage referred to in (1) permitting grass and weeds to grow and accumulate on its right of way so as to obstruct the view of its cars approaching Martin street from the west, and which prevented plaintiff while driving southward, from seeing and observing the approach of defendant's car until within eight feet of the track; (2) in operating its car at the high, dangerous and reckless rate of speed of twenty-five miles per hour within the limits of Gas city and across Martin street in violation of the ordinance referred to; (3) in operating and running its car without headlights or other front lights and signals; (4) in failing to ring the bell, sound the gong or give other warning or danger signal of the approach of its car; and (5) in operating its car without a conductor."

Defendant answered that the alleged injuries and damages were caused by plaintiff's own negligence and without defendant's fault.

The general verdict was in favor of plaintiff, and the following special questions were answered by the jury:

"1. At what rate of speed per mile (hour) was the plaintiff's automobile moving when he first discovered the approaching car? Ans. Four to five miles.

"2. When plaintiff was at a point twenty-five feet north of the railroad track in question, what was there, if anything, to prevent him seeing or hearing the approaching car? Ans. Bank and weeds.

"3. What distance was the plaintiff from the railroad track in question when he first discovered the approaching car? Ans. Front end of automobile eight feet from rail.

"4. Were the inside lights and the headlight of the car in question burning as it approached Martin street at and just before the time of the accident? Ans. Light burning.

"5. From what distance within twenty-five feet north of the railroad track could plaintiff first have seen the approaching car in question? Ans. Fifteen feet.

"6. Did plaintiff as he was approaching the railroad crossing in question, bring his automobile to a stop before it reached the north rail of the track? Ans. No.

"7. When plaintiff was at a point eight feet north of the railroad track, what was there, if anything, to prevent him seeing or hearing the approaching car? Ans. Nothing.

"8. As the plaintiff approached the crossing in question what, if anything, was there to prevent him seeing or hearing the approaching car in time to stop his automobile before it passed on to the north rail of the track, if it did? Ans. Bank and weeds.

"9. What was the distance from the railroad track to the embankment, north of the track and west of Martin street, which plaintiff testified prevented him seeing the approaching car in question? Ans. Bottom of bank five feet from rail.

"10. At what rate of speed per hour was the defendant's car in question moving when the motorman discovered the plaintiff's automobile approaching the crossing? Ans. About twelve miles per hour."

Defendant appeals, contending that it was entitled to judgment on the special findings.

The jury found that the interurban car was running at a rate of twelve miles per hour. The city ordinance fixed the speed limit of such cars at six miles an hour. The reasonableness of this ordinance is not questioned, but it is contended that the violation of the city ordinance did not contribute to the accident. There is merit in that contention. The evidence shows that the automobile stopped at the north rail. It is therefore clear that the collision would have occurred even if the interurban car had been running at the speed permitted

by the ordinance. If plaintiff's automobile had not stopped at the north rail the defendant's car traveling at six miles an hour would have struck the automobile somewhere about the center—a matter of mathematical calculation. It is settled law that a mere violation of a city ordinance does not subject the party violating it to an action for damages unless those damages are proximately traceable to the disobedience of the ordinance or unless the disobedience of the ordinance clearly aggravated the damages. (*A. T. & S. F. Rld. Co. v. Morgan*, 31 Kan. 77, 1 Pac. 298; *Railway Co. v. Herman*, 64 Kan. 546, 68 Pac. 46; *Railway Co. v. Chick*, 6 Kan. App. 480, 483, 50 Pac. 605; see, also, Note, 5 L. R. A., n. s., 209-212.)

It is generally held that disobedience of a city speed ordinance is negligence *per se*; but to entitle one injured or damaged through the breach of the ordinance to recover judgment **thereon he must himself be free from fault or negligence**, and the latter point is the controlling question in this case. Was the plaintiff free from negligence? The embankment and weeds obscured his vision as he approached the crossing, yet he did not stop his automobile to determine whether he might cross in safety. At fifteen feet from the crossing nothing prevented him from seeing the approaching car. Even then, if plaintiff had been taking proper precaution for his own safety, he could have stopped his automobile before it reached the track, for its speed was only four or five miles an hour. The rule in this state is that when one is about to cross a railroad track, and cannot otherwise assure himself that he may safely do so, he must stop, look, and listen. (*Bunton v. Railway Co.*, 100 Kan. 165, 168, 163 Pac. 801; *Burzio v. Railway Co.*, post, p. 287, just decided, and citations therein.) Such, indeed, was the general rule in the cases of pedestrians and horse-drawn vehicles before the coming of automobiles. (*A. T. & S. F. Rld. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Railroad Co. v. Willey*, 60 Kan. 819, 58 Pac. 472.) With the coming of the automobile, a highly scientific invention and easy of control, and with its great weight and steel construction and its consequent capacity for imperiling the traveling public in case of collision, the courts have been compelled to develop a more rigid rule, or rather to insist more rigidly upon the application of the old rule, touching the duty of self-preservation imposed

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on those about to cross a railway track in such a vehicle. (*Wehe v. Railway Co.*, 97 Kan. 794, 156 Pac. 742; *Jacobs v. Railway Co.*, 97 Kan. 247, 154 Pac. 1023; *Cathcart v. Oregon-Washington R. & Nav. Co.*, [Ore.] 168 Pac. 308.)

In the *Wehe* case the view of the driver of the automobile was shut off by a stone wall and buildings. The court said:

"The driver of an automobile cannot recover damages for injury to himself and his machine, where he approaches a railway track at a place at which he cannot see along the track until his automobile is in a place where it will be struck by a passing engine or cars, and does not stop his car to ascertain whether or not there is danger, although he listens before going into the place of danger and does not hear any engine or cars coming." (Syl.)

Notwithstanding the defendant's disobedience of the speed ordinance of the city and its possible negligence in permitting weeds to grow on the embankment along its right of way, the special findings show that the plaintiff was guilty of such contributory negligence as bars his right of recovery, and the defendant was entitled to judgment on the special findings of the jury.

Reversed.

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No. 21,213.

G. W. GOSS, *Appellee*, and W. H. AARON, *Appellee and Appellant*, v. W. M. ROTHROCK and C. B. DICKENS, *Appellants and Appellees*.

SYLLABUS BY THE COURT.

1. OIL AND GAS LEASE—*Executed to One of Group of Buyers—Title for Benefit of All—Innocent Purchaser.* Where an oil and gas lease is executed to a member of a group of buyers, who takes title for the benefit of all, one who buys from the trustee with notice of the trust acquires no beneficial title against the actual owners.
2. SAME—*Oral Contract Concerning Land—Statute of Frauds—Estoppel.* Where an oil and gas lease negotiated by several lessees is made to one of them for the benefit of all, he by agreement advancing the purchase price and drawing upon the others for their respective shares, the drafts being paid, their claims thereto cannot be defeated on the ground that the transaction amounts to an oral contract for the sale of an interest concerning lands.
3. SAME—*Trust in Real Estate—Created by Parol.* Where without any fraudulent intent an oil and gas lease is executed to one of several purchasers, all of whom join in paying the consideration, under an

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agreement that he is to hold it for the benefit of all, neither the trustee, nor any purchaser from him with notice of his fiduciary capacity, can defeat the trust on the ground that it was not created or evidenced by writing, even assuming that a trust in relation to such lease is one concerning real estate. .

4. *SAME—Sale of Lease—Ratification—Estoppel.* Where such a trustee makes a sale of the lease and receives the proceeds thereof, one of the beneficial owners who, with knowledge of the facts, elects to look to the trustee for his share of the purchase price, thereby ratifies the sale and precludes himself from claiming title to the lease as against the purchasers.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed January 12, 1918. Affirmed.

*Thurman Hill, Chester Stevens, O. L. O'Brien*, all of Independence, and *W. H. Sproul*, of Sedan, for the appellants.

*Charles D. Shukers*, of Independence, and *D. B. Horsley*, of Pawhuska, Okla., for appellee *G. W. Goss*, and for appellee and appellant *W. H. Aaron*.

*J. B. Tomlinson*, of Independence, and *Paul B. Mason*, of Camp Doniphan, Okla., of counsel.

The opinion of the court was delivered by

MASON, J.: An oil and gas lease was executed by the owner of the land to A. W. Lucas. Lucas assigned it to W. M. Rothrock and C. B. Dickens. G. W. Goss and W. H. Aaron brought an action against Rothrock and Dickens, alleging and asking the court to adjudge that they were each the owners of a one-sixth interest in the lease, the title to which had been by agreement taken by Lucas for the benefit of himself, the plaintiffs, and two other persons. Judgment was rendered in favor of Goss and against Aaron. The defendants appeal from the judgment against them, and Aaron appeals from the refusal to grant him relief.

1. The defendants claim that they are entitled to protection as innocent purchasers. There was evidence, however, that before they acquired the lease, and while the purchase was under consideration, Goss had told Rothrock that he and Aaron each owned a sixth interest in it. This was sufficient to warrant a finding, which the court must be deemed to have made,



that the buyers had such notice of the fact that Lucas held the title as a trustee as to put them on inquiry, and prevent their obtaining higher rights than were held by their grantor. (28 A. & E. Encycl. of L., 2d ed., 1128; 39 Cyc. 374-376; 2 Perry on Trusts and Trustees, 6th ed., § 828, pp. 1364, 1365.) The question does not turn directly upon the interpretation of the statute requiring conveyances to be recorded, as was the case in *Nordman v. Rau*, 86 Kan. 19, 119 Pac. 351. The situation does not arise from the omission to record an existing instrument, but upon the holding of the legal title to property by one person in trust for others. It is not necessary to the affirmance of the judgment that this court should be able to say that the facts shown constituted notice, but merely that there was room for a reasonable inference to that effect.

2. The contention is also made that a recovery is precluded by the section of the statute of frauds which prevents the enforcement of a contract for the sale of an interest in or concerning lands unless it is evidenced by a writing. (Gen. Stat. 1915, § 4889.) This is upon the theory that Lucas himself acquired the lease and agreed orally to sell an interest in it to Aaron and Goss. The evidence, however, was sufficient to justify the conclusion that the original transaction, as a result of which the lease was executed, was participated in by Aaron and Goss, and that the title was taken by Lucas for their benefit as well as for that of the other persons interested, although by agreement Lucas advanced the money to pay for it and drew upon the others for their respective shares, the drafts being paid. In that situation the statute referred to interposes no obstacle to the plaintiff's claim.

3. It is further contended, however, that such a trust is rendered nonenforceable by the statute which forbids the creation of a trust concerning lands by parol. (Gen. Stat. 1915, § 11674.) The lease involved was an ordinary exploratory oil and gas lease, by which no title passed (*Gas Co. v. Neosho County*, 75 Kan. 335, 39 Pac. 750), and it may be doubted whether a trust in relation thereto is one concerning real estate. An oral trust with respect to a real-estate mortgage is held not to be forbidden by such a statute. (39 Cyc. 51, 52.) Assuming the rule to be otherwise with respect to such an instrument as that here involved, the right of the plaintiffs to recover is

not affected, because implied or resulting trusts are excepted from the operation of the statute. There was evidence that Aaron and Goss each paid one-sixth of the consideration for the lease, the title to which was taken in Lucas, who by agreement and without fraudulent intent was to hold title for them to that extent. The law provides that where a conveyance is made to one person, the consideration being paid by another, no trust shall ordinarily result in favor of the latter. (Gen. Stat. 1915, § 11679.) But an exception is made, which applies in this case, "where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof." (Gen. Stat. 1915, § 11681; *Rayl v. Rayl*, 58 Kan. 585, 50 Pac. 501.)

4. In behalf of Aaron it is argued that the findings of fact, which the court necessarily made in order to give judgment for Goss, also require a judgment in his favor. But there was evidence that Aaron, with knowledge that Lucas had assigned the lease to the defendants and received payment in full therefor, elected to treat Lucas as indebted to him for his share of the proceeds, and thereby ratified the sale. This precluded his asserting title to the lease.

The judgment is affirmed.

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No. 21,220.

A. R. KINKEL, *Appellant*, v. FRED F. CHASE, *Appellee*, et al.

SYLLABUS BY THE COURT.

1. JUDGMENT RENDERED—*No Journal Entry Recorded—Judgment Valid.* The omission of the clerk to perform the ministerial duty of recording a judgment does not destroy the judgment, nor does its validity or effect remain in abeyance until it is formally entered on the journal.
2. JUDGMENT—*Creditor's Bill—Only the Parties Affected Thereby.* A judgment against the defendant in a suit in the nature of a creditor's bill will not inure to the benefit of another creditor of defendant, who is neither party nor privy to the judgment.
3. JUDGMENT—*Contribution Between Judgment Debtors—Subrogation.* A surety who satisfies a judgment against his principal, and files with the clerk notice of his intention to claim repayment under section 474

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of the code of civil procedure, has all the rights and remedies of an owner of the judgment for the purpose of enforcing repayment.

4. CREDITOR'S BILL—*Demurrer to Evidence—Erroneously Sustained.* In a suit in the nature of a creditor's bill, *held*, that it was error for the court to sustain a demurrer to the evidence.

Appeal from Morris district court; ROSWELL L. KING, judge.  
Opinion filed January 12, 1918. Reversed.

*Edwin Anderson*, of Council Grove, and *Frans E. Lindquist*, of Kansas City, Mo., for the appellant.

*M. B. Nicholson*, and *W. J. Pirtle*, both of Council Grove, for the appellees.

The opinion of the court was delivered by

PORTER, J.: This is a suit in the nature of a creditor's bill. The court gave judgment in favor of the defendant, and the plaintiff appeals.

On the 23d of June, 1915, a judgment was rendered in the district court of Morris county in an action on a promissory note against A. R. Kinkel, the plaintiff in the present suit, W. J. Kinkel, and Dyson Jackson, and the court made an order that if the judgment was paid by either of the Kinkels they should be subrogated to the rights of the plaintiff in the action. Later, on July 17, A. R. Kinkel satisfied the judgment as to himself and W. J. Kinkel by paying the sum of \$383.50, and duly filed with the clerk of the court a notice claiming contribution and the right of subrogation under section 474 of the civil code. (Gen. Stat. 1915, § 7378.) On June 23, 1915, the same day the judgment was rendered against the Kinkels and Dyson Jackson, a judgment was rendered in the same court in another action in the nature of a creditor's bill brought by J. B. Lamb and S. H. Crowley against Dyson Jackson, Annie Jackson, his wife, and Samuel M. Jackson, his son, and other defendants. The petition in that case alleged that Dyson Jackson was the owner of 420 acres of land and other real estate in Morris county, and had taken the title in the name of his wife and his son with the intent to hinder and delay his creditors. The judgment sustained all the allegations of the petition, and the court held that Dyson Jackson was the owner of the land and decreed that the title thereto be vested in him

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for the use and benefit of his creditors, and that his wife and son be divested of any right or interest under the conveyance to them. No journal entry of this judgment was entered by the clerk of the court, but the entries on the judge's trial docket of that date showed the nature of the judgment rendered.

On the 26th of October, 1915, Dyson Jackson sold the land to Fred F. Chase. The warranty deed recited a consideration of \$25,000, and it was executed not only by Dyson Jackson but by his wife and son, in whom the legal title had rested prior to the rendition of the judgment in the suit brought by Lamb and Crowley.

The petition in the present case recited the foregoing facts and alleged that the judgment which A. R. Kinkel had satisfied became a lien on the 420 acres of land, not only by virtue of the judgment rendered in the case of Lamb and Crowley v. Dyson Jackson et al., but for the further reason that the land in fact belonged to Dyson Jackson at that time; and further, that Fred F. Chase, defendant in this case, purchased the real estate with full knowledge that the judgment for \$383.50 had been rendered and that it was a valid and binding lien thereon. Incidental to the suit, Kinkel asked the court to "make a *nunc pro tunc* judgment" in the old case of Lamb and Crowley v. Jackson et al., as of June 23, 1915, divesting Samuel M. Jackson and Annie Jackson of all their title to the real estate and vesting the title thereto in Dyson Jackson for the use of his creditors.

The defendant Chase filed an answer denying that plaintiff Kinkel ever had any lien on the land adverse to his and alleging that he purchased the land and gave full value without notice, actual or constructive, of any lien or claimed lien on behalf of Kinkel.

On the trial the records, papers, and files in the former suits and the various conveyances affecting the title were introduced in evidence. Plaintiffs also offered oral evidence to show that parties representing defendant Chase before the conveyance to him was made came to Kinkel and offered him \$60 for a release of his judgment, and told him that if he refused to take that they would recommend to Mr. Chase that he close the deal anyway. There was evidence also that the

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liens of the other creditors in the former suit were satisfied out of the purchase money paid by Chase. The trial court entered a *nunc pro tunc* judgment in the case of Lamb and Crowley v. Jackson et al., as of June 23, 1915, setting forth in full the terms of the judgment actually rendered on that date. The defendant demurred to the plaintiff's evidence, and the court sustained the demurrer.

In a written opinion, the trial court stated the reasons for sustaining the demurrer, which were that inasmuch as the plaintiffs in the first creditors' bill had not brought their suit for the use and benefit of other creditors that might desire to come in and set up claims, the judgment declaring the conveyance of the real estate to the wife and son of Dyson Jackson fraudulent and void was solely for the benefit of the plaintiffs and other parties to that suit, and that since Kinkel was not a party he could derive no benefit from the judgment. In stating the grounds for sustaining the demurrer the court laid considerable stress on the fact that there was no journal entry of the judgment on record in the Lamb and Crowley case, and held that for this reason Chase, when he desired to purchase the land, would find nothing of record indicating that Kinkel had any interest in or lien thereon, and that therefore he must be held to have purchased without notice of any such lien or claim on the part of Kinkel, and the court further held that there were no judgments which were liens against the land at the time Chase purchased, except those pleaded in the first creditors' suit.

So far as the judgment sustaining the demurrer rests on the failure to have a journal entry recorded in the first creditors' bill brought by Lamb and Crowley, the court was in error. The judgment was rendered on the 23d day of June, 1915, and it was no less a judgment because the clerk failed to prepare and file a journal entry. "The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record." (1 Black on Judgments, § 106.) It was therefore not necessary for the plaintiff in the present case to obtain from the court an order for a *nunc pro tunc* judgment. The ruling of the court making what is called such a judgment amounts to nothing more, however, than the approval of a journal entry reciting the details of the decree.

If Kinkel could predicate any rights by virtue of the judgment in the first creditors' suit, he is not in any sense deprived of that right because of the failure of the clerk to perform a ministerial duty. If Chase, when he purchased the land, desired to know the nature and terms of the judgment that had been rendered against Dyson Jackson in the first case, and could find no journal entry of record, he was bound to examine the pleadings in the case, and finding a judgment in favor of plaintiff against the defendant, he was bound, in the absence of any other information, to assume that every material averment of the petition was found against Dyson Jackson and the other defendants.

The law is well settled that one who is neither a party nor privy to an action is not only not bound by the judgment therein, but he can derive no benefit from it. (*Manley v. Debentures Co.*, 64 Kan. 573, 68 Pac. 31; *Ervin v. Morris*, 26 Kan. 664.) Where, however, a judgment or decree operates in law as a conveyance, one who is not party or privy to the action may avail himself of the effect of the judgment as a transfer to the same extent that he may rely upon a voluntary conveyance of the title. In *Lockwood v. Meade*, 71 Kan. 739, 741, 81 Pac. 496, it was said in reference to cases which properly include an order for one party to convey to another whatever interest he may have in the real estate involved, "such a decree would, of course, effect a transfer of title as effectually as a voluntary conveyance. (*Woolworth v. Root*, 40 Fed. 723, 726.)" The decree in the first creditors' suit specifically declared that the title to the real estate should be vested in Dyson Jackson. It was not, however, the purpose of the creditors' suit to vest the title in him; but rather to obtain a decree holding in effect that the title always had been in him, and that the judgments of the plaintiffs were liens on the real estate, notwithstanding the conveyances. If a judgment in favor of one creditor who brings proceedings in aid of execution, or what is usually termed a creditor's bill, operates in every instance to vest the title of the real estate in the debtor, it would seem a useless proceeding to invite or permit other creditors to come in and become parties to the suit; and yet much learning of the courts has been brought to bear upon the right of other creditors to intervene and share in the costs of the proceeding.

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Really, the creditor who brings the suit in his own behalf is interested, not in securing a judgment which shall operate as a voluntary conveyance or transfer of the title, but his sole purpose is to have a decree declaring his judgment a lien on the real estate, notwithstanding the fraudulent transfer. It would seem, therefore, that Kinkel cannot rely on the judgment in the first creditors' suit as having the effect of a voluntary transfer of the title to Dyson Jackson.

Plaintiff had a cause of action entirely independent of the effect of the decree in favor of Lamb and Crowley, a cause of action based upon the lien of his judgment and the allegations in his petition to the effect that the land belonged in fact to Dyson Jackson when his judgment was rendered. Under the provisions of section 474 of the civil code, by satisfying the judgment and filing notice with the clerk of his intention to claim repayment, Kinkel became entitled to the benefit of the judgment as owner for the purpose of enforcing repayment. (*Harris v. Frank*, 29 Kan. 200.) A judgment in this state is a lien on whatever equitable interests the judgment debtor has in real estate. (Civ. Code, § 522.) In *Poole v. French*, 71 Kan. 391, 80 Pac. 997, it was ruled that land held by an equitable title may be levied upon and sold by virtue of a general execution, and further that the remedy by a creditor's bill, or proceedings in aid of execution, is merely cumulative to that afforded by a general execution. The judgment which plaintiff owns against Dyson Jackson was a lien upon the equitable interests of Dyson Jackson in the real estate in question from the first day of the term at which it was rendered. It was of record when Chase purchased the land. All that remained for Kinkel to establish was, that when Dyson Jackson repurchased the land he took the title in the name of his wife and son in fraud of creditors. The question of actual notice was not a material one. If it had been the court could not sustain a demurrer on the ground that the evidence offered to show actual notice was insufficient, because defendant's demurrer admitted the truth of every fact proved by the evidence and of every reasonable inference that might be drawn therefrom in plaintiff's favor.

From the statement of the trial court in sustaining the demurrer, it is apparent that the real issues were lost sight of,

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and that the case was determined upon the effect of a failure to record a journal entry of the judgment in the first creditors' suit, and the necessity of showing that Chase had actual notice of the fraudulent transfers, rather than upon any failure of plaintiff to establish fraud. Proof of actual notice was not necessary, because if, in fact, the real estate belonged to Dyson Jackson when plaintiff's lien attached, the plaintiff must prevail. In view of these facts, and the further fact that the same court has once held that the transfers were fraudulent, we think justice requires that the order sustaining the demurrer should be reversed, and that the plaintiff should be permitted to try out the question of fraud.

Reversed and remanded.

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No. 21,221.

LEMUEL P. SNODGRASS, *Appellant*, v. THOMAS C. SNODGRASS and W. J. PIRTLE, *Appellees*.

SYLLABUS BY THE COURT.

1. **QUIETING TITLE—Bond to Quiet Title—Demurrer to Evidence Properly Sustained.** A testator who had purchased certain land, including the triangular piece in the northwest corner of a certain section north of a certain road, devised such land to his two sons, one to have the east half and the other the west half of the entire tract, as it was described in the deed. One of the brothers gave a bond in the sum of \$1,500 to quiet in the plaintiff the title to the triangular strip "containing 122 acres, more or less." The testimony showed that the defendant Snodgrass brought a suit in his brother's name against himself and another, resulting in findings to the effect that in the deed to the ancestor and in the will the strip in question was bounded on the south by the wrong road, leaving 46 acres between the two roads, and making 76.45 acres instead of 122 acres comprised in the triangular strip. Instead of a decree quieting title to the 76.45 acres, the obligor in the bond tendered to his brother, the plaintiff, a quitclaim deed, he having asserted a mineral lease covering the strip in question and other lands. The plaintiff testified that he was not certain of the number of acres, but he was to take whatever number there were for the consideration named in the bond. *Held*, that the court committed no materially prejudicial error in sustaining a demurrer to the plaintiff's evidence.
2. **SAME—Tender of Quitclaim Deed—Title Quieted.** While the tender of the quitclaim deed was on condition that it be accepted in satisfaction of the bond, which condition had no proper place in such tender, still as



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the deed itself effected the quieting of the title in the plaintiff to all the land he could rightly claim, such wrongful condition is held not to have rendered the tender void.

3. *SAME—Bond—Misdescription of Land—Reformation.* While no reformation of the bond was sought or made in this action, defendants were not materially harmed or prejudiced by the fact that the trial court treated the instrument as if reformed, so that the description of the tract in question would correspond to the deed to, and the will by, the ancestor.
4. *SAME—Evidence of Value of Certain Land Properly Rejected.* As the testimony showed that the plaintiff is not entitled to the forty-six acres between the two roads, it was not error to reject evidence of its value or evidence of the value of the land deeded in consideration of the bond sued on.

Appeal from Morris district court; ROSWELL L. KING, judge.  
Opinion filed January 12, 1918. Affirmed.

*Edwin Anderson*, of Council Grove, and *Frans E. Lindquist*, of Kansas City, Mo., for the appellant.

*M. B. Nicholson*, and *W. J. Pirtle*, both of Council Grove, for the appellees.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued on a "Bond for deed and to quiet title," and from an order sustaining a demurrer to his evidence he appeals.

Thomas S. Snodgrass died owning the south half of section 30 and a triangular tract in the northwest corner of section 31, township 17, range 7, and left a will devising it all to his two sons, Lemuel P. and Thomas C., to be by them divided as equally as possible, the south half of section 30—

"and the irregular triangled tract of 76 45-100 acres in the North-West part of Section 31 . . . , containing altogether 396 45-100 acres, more or less. The said Lemuel P. Snodgrass to have the west half of said two tracts, and the said Thomas C. Snodgrass to have the East half thereof."

Thomas C. Snodgrass conveyed his part of the land to John R. Veal, but his brother, Lemuel P., disputed the division, and, to settle the matter, it was agreed that he should give to Veal a quitclaim deed to the southeast quarter and 38 acres off the east side of the southwest quarter of section 30, and Thomas

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C. was to quiet in Lemuel P. the title to the irregular tract in the northwest quarter of section 31, whereupon he entered into a bond in the sum of \$1,500, which recited, among other things, that—

“This condition of the obligation is such, that said party of the first part, Thomas C. Snodgrass, has and hereby agrees to and with Lemuel P. Snodgrass to quiet the title to the following described real estate in Lemuel P. Snodgrass, to-wit: All land in North half of Section 31, Township 17, Range 7, lying north of the O. F. Barr Road which was established October 7th, A. D. 1885, containing 122 acres more or less, . . . said title to be quieted against Andrew Drummond, Thomas C. Snodgrass and all other necessary parties, their heirs, successors and assigns. The consideration for making and signing of this bond is the signing and delivering by the said Lemuel P. Snodgrass a quit-claim deed to John R. Veal, at the request and on the behalf of Thomas C. Snodgrass, to the Southeast quarter of Section 30, . . . Now, if the said Thomas C. Snodgrass, party of the first part, on or before the first day of July, A. D. 1916, succeed in quieting the title to the 122-acre triangular piece of land first herein described, to wit: All real estate in the North half of Section 31, . . . lying and situate north of the O. F. Barr road, which was established October 7th, A. D. 1885, containing 122 acres, more or less, in Lemuel P. Snodgrass, then this obligation shall be void, otherwise to remain in full force and effect.”

The answer admits the execution of the bond, and alleges that in accordance therewith Thomas C. Snodgrass caused a suit to be brought and a judgment rendered quieting in Lemuel P. Snodgrass the title to the land designated in the bond—

“being all the land lying north and west of the public road across the northwest corner of section 31 . . . , with the exception of a certain mineral lease in favor of said Thomas C. Snodgrass,”

and alleging the tender of a quitclaim deed to cover such leasehold interest. Further, that when the bond was executed there was a dispute as to the amount of land conveyed by E. G. Williams to Thomas C. Snodgrass and a dispute as to the location of the public road across the northwest corner of section 31, to correct which the bond was given.

The reply was a general denial and a special denial that Thomas C. Snodgrass had performed the conditions of the bond or quieted the title to the land designated therein.

On the trial it was shown that the suit to quiet title had been brought, resulting in findings to the effect that Andrew Drummond procured title by purchase and conveyance to all the

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land lying south and east of the public road in section 31, containing 560½ acres, more or less; his deed being recorded January 2, 1902; that on January 25, 1901, there existed across the northwest corner of section 31 a fenced and traveled public highway which was in general use as a public highway and had been for several years. That in 1885 a road was surveyed and laid out some distance south and east of the former road, but was never opened, fenced, traveled, or improved. That when Drummond purchased, the owner intended to convey and did convey all of section 31 south and east of the fenced and traveled road; that Drummond entered into possession and had so remained and was the owner in fee simple of all the land in that section lying south and east of such road. It was further found that when the deviser purchased the part of section 31 of E. G. Williams, there was a mistake in the description, the grantor intending to convey and as a matter of fact conveying only that part north and west of the fenced and traveled road. It was decreed that this deed from Williams to the deviser be reformed as indicated, and that Thomas C. Snodgrass was the owner of a mineral lease covering, with other lands, all that part of section 31 conveyed to the deviser by Williams.

Lemuel P. Snodgrass testified that he agreed to give Mr. Veal a quitclaim deed to the 38 acres, for which Thomas C. was to quiet Lemuel P.'s title, in the 46 acres of land lying between the two roads, worth from \$25 to \$30 an acre; that he supposed there were 122 acres in the triangular strip lying north of the O. F. Barr road, the one unopened and untraveled.

"I was not certain of the number of acres but whatever number there was I was to take for the 38 acres I deeded to Mr. Veal."

The trial court criticised Thomas C. Snodgrass for asserting his leasehold interest in the land to which he had given a bond to quiet title, but this was sought to be explained by the suggestion, that as his mineral lease covered other lands also he did not want its validity impaired by a decree touching the land in question, and, therefore, asserted his claim, and then tendered a quitclaim deed, instead of a decree quieting the title thereto.

The view was taken that the sons had no greater interest in the land than their father had when he died; that the father

claimed only 76.45 acres and not 122 acres, and in the devise designated it as 76.45 acres. That, as a matter of fact, the traveled road and not the Barr road was intended, and that title had been quieted to the land contemplated by the grantor who deeded to the father, and by the father who devised to the sons, and by the sons when they entered into the agreement recited in the bond.

The evidence supports these conclusions, and although the bond recites that all the land in section 31 north of the Barr road was to be quieted, the court acted on the theory that the will of the testator intended to follow the deed to him from the former owner, and that the real land in controversy and the tract covered by the bond is the land north of the traveled road and not that north of the Barr road.

While it seems that the deed to the testator was corrected in the quiet-title suit, the bond itself was not reformed in the case now before us, nor was such reformation requested, and the literal obligations of the bond as written were not performed. Counsel for the defendants say that the bond states very plainly that Thomas C. Snodgrass was only to quiet the title in Lemuel to whatever land there was contemplated by the will of his father, lying between the Barr road and the corner of section 1 as traveled and understood by the public. We do not find any such language in the bond. On the contrary, it clearly and repeatedly calls for all the real estate north of the Barr road. The land between the two roads amounts to 46 acres. Much discussion is had concerning the expression "more or less," but the real difficulty arises, not from the use of these words, but over the question as to which of the two roads marks the southeastern boundary of the triangular tract.

It is complained that Thomas, in the absence of his brother from court, took a default decree as to his mineral lease covering the land north of the traveled road. Also, that when he tendered the quitclaim deed it was on condition that it be accepted in full settlement of the bond and agreement in question; and such is the nature of the tender as shown by the record. Complaint is also made of the ruling striking from the record evidence of the value of the 46 acres between the two roads. Of course, if the plaintiff can rightfully demand

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that his title be quieted to this tract, it was error to exclude the evidence of its value, for, while the bond was in the sum of \$1,500, there is no claim that this was liquidated damages, and if the plaintiff could recover at all it would be only such actual damages as he could show, not exceeding the amount named in the bond (*Metz v. Clay*, 101 Kan. 45), and such actual damages would be determined by the value of the land to which his title was not quieted.

The value of the 38-acre tract was not material, and it was not error to reject evidence thereof.

Had the defendants desired to reform the bond and limit their obligation to the tract north of the traveled road, and had such reformation been made, the court would have been exactly right in holding in favor of the defendants.

Should the judgment be reversed and the cause remanded for further proceedings and a request be made for reformation, such reformation would inevitably follow, and should the cause be remanded with directions to reform the bond, such proceeding would only arrive at the very point already reached by the trial court. While, technically, the plaintiff suffered nominal damages, and while the tender of the quitclaim deed should not have been conditional, it is clear that by accepting it the plaintiff's title would, in fact, be quieted to all that really came to him by his father's will, and in this day of disregarding empty forms and mere technicalities it would be idle to reverse and remand.

The judgment is therefore affirmed.

No. 21,224.

AUGUST BURZIO, by his next friend, PAULINE BURZIO, *Appellee*,  
v. THE JOPLIN & PITTSBURG RAILWAY COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Railroad Crossing—Special Findings—Instructions*. Where a jury has been properly instructed concerning negligence, and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms, state facts and not conclusions of law.
2. AUTOMOBILE—*Negligence of Driver—No Imputed Negligence to Minor Son*. The negligence of a father in driving an automobile across a railroad track, without stopping, looking, or listening, cannot be imputed to his ten-year-old son who is riding with him.
3. NEGLIGENCE—*Railroad Crossing—Obstructions to View*. Liability of a railway company for injuries to those riding in an automobile, sustained in a collision with a train at a highway crossing, may be founded on the company's negligence in allowing weeds, grass, and brush to grow on its right of way so as to obstruct the vision of those riding in the automobile while they are approaching the railway track.
4. NEGLIGENCE—*Verdict—Findings Interpreted*. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed January 12, 1918. Affirmed.

John P. Curran, of Pittsburg, and S. L. Walker, of Columbus, for the appellant.

C. A. McNeill, and Maurice McNeill, both of Columbus, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendant appeals from a judgment rendered in favor of the plaintiff for injuries sustained by him in a railroad-crossing accident.

The plaintiff, a boy ten years old, was riding with his mother in the rear seat of an automobile driven by his father. The father attempted to drive the automobile across the railway track in front of an approaching electric car. At the

place of the accident, the track ran in a straight line for some distance north and south, and ran parallel with a public road near the railroad right of way. John Burzio, the plaintiff's father, with the plaintiff and the plaintiff's mother, left his home to go to Pittsburg, and for some distance, going north, traveled along the side of the defendant's railroad and saw the car, with which the automobile collided, going north. The electric car and the automobile passed each other once or twice during the trip. At the place of the accident, a road running east and west crossed the railroad track. About five and one-half feet west of the track, and for two hundred feet south of the east-and-west road, there was a hedge which prevented a view of the railroad, and between the hedge and the railroad there was a growth of brush, weeds, and grass which, for a portion of the distance, prevented a view of the railroad from the public road running east and west. After turning east from the road running north and south, to cross the railroad track, and for about fifteen feet from the railroad track, there was an unobstructed view of the track to the south for two hundred feet or more. John Burzio turned east and attempted to cross the railroad. He did not see the car coming until he was on the track. He slowed down his car before he crossed the track. The electric car struck the automobile and injured the plaintiff. To recover for that injury he brought this action.

The plaintiff alleged that the defendant negligently permitted the growth of vegetation, hedge, weeds, and underbrush; that the defendant, on the occasion of the accident, did not give any warning of the approach of the electric car; and that the defendant failed to provide the electric car with good and sufficient brakes so that it could be quickly stopped, and failed to provide the electric car with a good and sufficient whistle or other signal with which to warn persons of danger. The jury, on questions requested by the plaintiff, made special findings of fact as follows:

"No. 1. Was there a growth of hedge, or grass, or weeds or underbrush on defendant's right of way, that obstructed the view to the south of one traveling past in an automobile on the road plaintiff was injured on, if injured, to that extent that an occupant of the automobile could not, with reasonable and ordinary care and diligence, have seen

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the approaching car until too near the crossing to avoid injury? Answer: Yes.

"No. 2. Was the defendant negligent in failing to keep its right of way and the approach to the track reasonably free from weeds, grass, and underbrush, thereby obstructing the view of cars coming from the south by persons going east in an automobile, until practically upon the track? Answer: Yes.

"No. 3. If you answer questions numbers 1 and 2 in the affirmative, state whether or not such conditions contributed to plaintiff's injury, if any? Answer: Yes.

"No. 4. Was the defendant negligent in failing to give reasonable notice, alarm and warning of the approach of its line car to the crossing in question? Answer: Yes.

"No. 5. Did the defendant's agents and employees in charge of the line car, have notice and knowledge of the fact that an automobile with occupants was approaching the crossing in question? Answer: No.

"No. 6. Was the line car of the defendants equipped with a whistle for giving warning or alarm? Answer: No.

"No. 7. Was the line car equipped with air brakes? Answer: No.

"No. 8. Did the plaintiff, August Burzio, do anything that was careless or negligent at or prior to the time of his injury which contributed thereto? Answer: No."

On questions requested by the defendant the jury answered as follows:

"Question 1. How fast was the automobile going (miles per hour) as it turned east and approached the railroad track? Answer: 8 miles per hour.

"Question 2. How many feet west of the west line of the railway right of way was the hedge row which plaintiff claims obstructed the view of the driver of the automobile? Answer: Five ft. five in.

"Question 3. How far south down the railroad track could the driver of the automobile have seen the approaching electric car after he turned the corner and just before he drove from a place of safety onto the railroad track, had he stopped the automobile and looked or listened for a car? Answer: 15 ft. west of track. See 200 feet.

"Question 4. Was the bell or gong on the electric car rung or sounded as the car approached the road crossing? Answer: Yes.

"Question 5. How fast was the electric car going (miles per hour) when the motorman saw that the driver of the automobile intended to try to cross the railroad track in front of the electric car? Answer: 20 miles.

"Question 6. What caution, if any, did the driver of the automobile exercise after the turn east was made and as he approached the railroad crossing to avoid a collision with the electric car? Answer: Slowed down.

"Question 7. What notice or warning, if any, did the motorman on the electric car have that the automobile was going to be turned at the corner



and go east across the railroad before the automobile went around the corner and onto the railroad track in front of the electric car? Answer: Did n't have any.

"Question 8. What was the negligence, if any, that caused the plaintiff's injuries? Answer: Not properly equipped.

"Question 9. How far south was the railroad car from the road crossing and point of collision when the motorman saw and realized that the driver of the automobile was attempting to cross the railroad in front of the electric car? Answer: 40 ft.

"Question 10. What did the defendant fail to do that it should have done that caused plaintiff's injuries? Answer: Did n't have car properly equipped with air brakes and whistle."

1. The defendant argues that the special findings of the jury show that the verdict should have been for the defendant and that the plaintiff was not entitled to judgment, and further argues that the answers to questions numbered 1, 2, 3, and 4 of those requested by the plaintiff are conclusions of law. This argument is not good. The instructions of the court are not set out in the abstract. In the absence of the instructions, it is presumed that they properly covered the legal propositions embraced in each of these questions, and it is further presumed that the jury followed the instructions in answering these questions. Under proper instructions, these answers state facts and not conclusions of law.

2. Under the evidence and under the findings of the jury, John Burzio was guilty of such contributory negligence as would prevent him from recovering any damages sustained by him in the accident, for the reason that he attempted to cross a railroad track without stopping, looking, or listening, although there was a place of safety from which his view of the track was unobstructed and from which he could see the approaching car for a distance of two hundred feet. (*Jacobs v. Railway Co.*, 97 Kan. 247, 154 Pac. 1023; *Wehe v. Railway Co.*, 97 Kan. 794, 156 Pac. 742; *Bunton v. Railway Co.*, 100 Kan. 165, 163 Pac. 801; *Williams v. Railway Co.*, 100 Kan. 336, 164 Pac. 260; *Moler v. Railway Co.*, 101 Kan. 280, 166 Pac. 488.)

But, can the negligence of John Burzio be imputed to the plaintiff? The evidence does not show that the plaintiff exercised or attempted to exercise any control over his father while he was driving the automobile. A clear statement of the rule of law governing the recovery of damages under such cir-

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cumstances is found in *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555, as follows:

"The question presented is whether he is to be deemed chargeable with the negligence of the driver. The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L. R. A., n. s., 597, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. (Note, 9 A. & E. Ann. Cas. 408; Note, 19 A. & E. Ann. Cas. 1225; Note, Ann. Cas. 1913 B, 684; see, also, *Denton v. Railway Co.*, ante, p. 51.) This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. (29 Cyc. 548-550; Note, 8 L. R. A., n. s., 648; 7 A. & E. Encycl. of L. 447, 448.) Where two persons are engaged in a common enterprise, using a conveyance for their purpose, each is said to be responsible for the acts of the other, but for this situation to arise each must have an equal right of control. (29 Cyc. 543; Note, 8 L. R. A., n. s., 628.) In the present case the jury found that the deceased was riding with the owner of the automobile as an invited guest on a pleasure trip. The defendant therefore cannot successfully invoke the doctrine of imputed negligence." (p. 73.)

In the *Corley* case an automobile was negligently driven onto a railroad track and was struck by a passing train. In that case the plaintiff's husband was a guest of the driver of the automobile and was killed in the accident. (See, also, *City of Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65; *Reading Township v. Telfer*, 57 Kan. 798, 48 Pac. 134; *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148; *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 558; *Anthony v. Kiefner*, 96 Kan. 194, 198, 150 Pac. 524; *Denton v. Railway Co.*, 97 Kan. 498, 155 Pac. 812; *Angell v. Railway Co.*, 97 Kan. 688, 156 Pac. 763.)

The negligence of John Burzio cannot be imputed to the plaintiff.

3. The defendant contends that it was not negligent and that therefore it is not liable to the plaintiff for the damages sustained by him. This contention is good if the defendant was not negligent, but the contention is not good if the defendant was negligent. The petition charged that the defendant was negligent in permitting vegetation, hedge, weeds,

and underbrush to grow on its right of way so as to obstruct the view of the railroad track from any one traveling on the road running east and west. The jury found that the defendant was negligent in failing to keep its right of way free from weeds, grass, and underbrush. In *Corley v. Railway Co.*, 90 Kan. 70, 133 Pac. 555, this court said:

"Liability of a railway company for injuries occasioned by a collision at a highway crossing may be founded upon its negligence in allowing unnecessary obstructions to vision to exist upon the right of way." (Syl. ¶ 1.)

In the *Corley* case this court carefully examined the question now under discussion and reached the conclusion just stated.

4. It is urged that the findings of the jury were contradictory to each other and to the general verdict, and it is also urged that judgment should have been for the defendant. The special questions should be interpreted so as to support the general verdict rather than so as to overturn and destroy it. (*Solomon Rld. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *U. P. Rly. Co. v. Fray*, 43 Kan. 750, 23 Pac. 1093; *Jackson v. Linnington*, 47 Kan. 396, 28 Pac. 173; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Railroad Co. v. Swarts*, 58 Kan. 235, 244, 48 Pac. 953; *MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69; *Osburn v. Railway Co.*, 75 Kan. 746, 90 Pac. 289; *Lewellen v. Gas Co.*, 85 Kan. 117, 121, 116 Pac. 221; *McClain v. Railway Co.*, 89 Kan. 24, 28, 130 Pac. 646; *Orr v. Railway Co.*, 98 Kan. 120, 123, 157 Pac. 421; *Tarin v. Railway Co.*, 98 Kan. 605, 608. 158 Pac. 874.)

None of the special findings contradicts, but all are consistent with, the finding that the defendant was negligent in allowing weeds, grass, and brush to grow on its right of way. That finding supports the verdict.

The judgment is affirmed.

No. 21,227.

JACOB MATNEY, *Appellee*, v. B. F. BUSH, as Receiver of THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

INTERSTATE COMMERCE—*Injuries to Workman—Workmen's Compensation Act Does Not Apply.* The workmen's compensation act does not extend to the case of a workman engaged in interstate commerce who, without his employer's fault, is injured in the course of his employment—following *New York Central R. R. Co. v. Winfield*, 244 U. S. 147.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed January 12, 1918. Reversed.

*W. P. Waggener, J. M. Challis*, both of Atchison, and *A. H. Campbell*, of Iola, for the appellant.

*F. J. Oyler*, of Iola, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff was injured in the course of his employment as a section laborer on the defendant's interstate railway track. His petition alleged facts sufficient to constitute a cause of action under either the federal employers' liability act, the Kansas workmen's compensation act, or the Kansas railroad employers' liability act, and perhaps under the common law. On motion of defendant, plaintiff was required to elect what law he would rely upon for a recovery, and he chose to base his right of action on the workmen's compensation act. Under that election, of course, the allegations of the petition charging the employer with negligence became immaterial, and the cause proceeded to judgment upon the evidence relating to plaintiff's injuries.

Judgment was entered for plaintiff on December 9, 1916, at which time the trial court followed the best light then available on the law of the case—that line of decisions which held that until congress should see fit to legislate on the subject of compensation for injuries to workmen engaged in interstate commerce where their employers were not at fault, that field might properly be occupied by state legislation. (*Rounsaville v. Cen-*

*tral R. R. Co.*, 87 N. J. L. 371; *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284, Ann. Cas. 1916A, 817.) Since then, however, the Winfield case, *supra*, has been reversed by the supreme court of the United States (*New York Central R. R. Co. v. Winfield*, 244 U. S. 147), that court deciding that the liabilities of interstate railroad companies to make compensation for personal injuries to their employees engaged in interstate commerce are regulated both inclusively and exclusively by the federal employers' liability act, and that no field remains for state legislation on this subject "even in respect of injuries occurring without fault, as to which the federal act provides no remedy." (Syl. ¶ 1.)

It is therefore needless to discuss the subject, and it must be held that our state workmen's compensation act does not extend to cases where workmen engaged in interstate commerce are injured in the course of their employment without their employer's fault.

Reversed and remanded with instructions to enter judgment for defendant.

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No. 21,229.

E. S. SEAPY, *Appellant*, v. R. V. SMART, *Appellee*.

SYLLABUS BY THE COURT.

**LEASE—Rentals—Share of Crops—Increase of Stock—Default of Landlord—Remedies.** Where a farm is rented on the condition that the tenant shall pay the landlord a certain share of the crops, and it is also agreed that the landlord shall provide cattle and hogs, the increase and profit from them to be divided on a specified basis, and the landlord fails to furnish the cattle and hogs in accordance with his agreement, but the tenant continues to occupy and raise crops upon the farm after the breach of the agreement by the landlord, the tenant is not relieved from the payment of rent, but is entitled to recover or recoup the damage actually sustained by reason of the landlord's default.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed January 12, 1918. Reversed.

Archie D. Neale, of Chetopa, for the appellant.

Al. F. Williams, and F. W. Boss, both of Columbus, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This action was brought by E. S. Seapy against R. V. Smart to recover rent upon a farm lease. At the trial both parties moved for judgment upon the pleadings. Judgment was rendered in defendant's favor for costs, and the plaintiff appeals.

The lease in question was originally entered into between E. J. Votaw and the defendant and was for a term commencing January 1, 1912, and ending February 28, 1915. The rent agreed upon was one-half of the nuts and crops raised, one-half of the milk sold, and one-half of the increase from certain stock. The lease contained a covenant by the landlord "to stock the farm with cows and brood hogs, to the value of \$1,500 to \$2,000, or what the farm will carry properly, this to be done within the first year."

The petition, filed in January, 1915, alleged that the plaintiff in June, 1912, became the owner of the land, and through an assignment of the lease became entitled to the rentals due under it; that since plaintiff's purchase of the land and lease defendant had continued to occupy and cultivate the farm, but had refused to pay plaintiff any rent; and that the value of the nuts and crops raised on the farm for the years 1913 and 1914 amounted to \$4,400, of which amount plaintiff was entitled to one-half.

Defendant's answer admitted the execution of the lease, plaintiff's ownership of the farm and his own occupancy thereof, but he alleged that the value of the crops raised on the farm for the time mentioned was not \$4,400 as stated by plaintiff, and did not exceed \$2,000. The defense alleged was the failure to stock the farm with cattle and hogs as provided in the lease, resulting in defendant's inability to carry out the terms of the lease on his part. It was further alleged as a counterclaim that he had been damaged in the sum of one-half of \$6,240, being the aggregate total of various items of profit that defendant estimated he would have realized had the landlord performed his covenant. There was also an allegation to the effect that at the time plaintiff purchased the farm he knew of the lease, of Votaw's failure to fulfill his covenant, and of the fact that defendant had made claim for damages from

Votaw and brought suit against him because of his failure to comply with the agreement; and that by reason of plaintiff's having succeeded to Votaw's interest in the lease he took the place burdened with the obligations of Votaw and was indebted to defendant in the sum of \$3,120, less whatever sum plaintiff might be entitled to by reason of the crops raised on the premises.

Plaintiff's reply admitted the failure to furnish the stock as the lease provided, and further alleged that defendant was not entitled to recover anything by reason thereof, because he had already set up his claim for damages in the suit against Votaw; that the damages sought were too remote; and that a recovery, if any, could only be had against Votaw.

The grounds of the ruling awarding judgment in favor of the defendant upon the pleadings are not shown by the abstract and, no brief or argument having been presented in behalf of the defendant, his theory of the case has not been brought to the attention of this court. As the pleadings stood, the plaintiff was entitled to recover from \$1,100 to \$2,200 as his share of the crops grown on the farm, unless the breach of the stipulation in the lease, that the landlord should furnish cattle and hogs, relieves the tenant from paying rent. It did not have that effect. The agreement to provide live stock which should remain the property of the landlord, the profits to be divided on a specified basis, was independent of that providing for the growing of corn and other crops and the payment to the landlord of a share of the crops. The tenant continued in possession and use of the farm after the landlord had made default. We need not decide whether the nonperformance of the landlord so affected the rights of the defendant and diminished his enjoyment that it might have been treated as an eviction and to have warranted him in surrendering the premises, since he continued in the occupancy of the farm after the landlord had broken his agreement. It has frequently been decided that the failure of the landlord to perform a part of his agreement will not relieve the tenant in possession from the payment of rent, but that he may recoup the actual damages resulting from the landlord's non-performance. (*Long v. Gieriet*, 57 Minn. 278; *Lewis & Co. v. Chisolm*, 68 Ga. 40; *Association v. Company*, 67 N. H. 450;

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*Partridge v. Dykins et al.*, 28 Okla. 54; *Rubens v. Hill*, 213 Ill. 523; 1 Taylor's Landlord and Tenant, 9th ed., § 265; 18 A. & E. Encycl. of L., 2d ed., 230.)

The plaintiff, who had succeeded to the rights and duties of Votaw, was entitled to the rent due, diminished by the amount of any damages sustained by the defendant by reason of the landlord's breach of the agreement. Under the pleadings it was necessary to introduce evidence as to the amount of rent due from the defendant, and also as to the loss which the defendant had sustained through the landlord's fault. The fact that defendant had a suit pending against Votaw for nonperformance does not preclude the setting up of the defense against the plaintiff. The latter had stepped into the shoes of Votaw and assumed the obligations and liabilities of Votaw; but, of course, if the defendant proceeds against them separately only one satisfaction can be obtained.

The judgment is reversed and the cause remanded for further proceedings.

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No. 21,235.

MICHAEL CHILLETTI, by his next friend, ERANA CHILLETTI, Appellant, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellee.

## SYLLABUS BY THE COURT.

SUMMONS—*Service on Railway Company in Hands of Receiver.* Where a railway corporation has been placed in the hands of a receiver under an order directing him to take into his possession and control all the assets and property of the corporation and to operate the railway, service of summons in an action against the railway corporation upon a station agent who is in the employ of the receiver, and who had formerly occupied the same position for the corporation, is not good service as to the corporation.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed January 12, 1918. Affirmed.

*Charles Stevens*, of Columbus, for the appellant.

*W. W. Brown*, and *James W. Reid*, both of Parsons, and *Al. F. Williams*, of Columbus, for the appellee.



The opinion of the court was delivered by

PORTER, J.: The trial court sustained a motion to set aside the service of summons, and the plaintiff appeals.

The action was brought October 4, 1915, to recover against the railway company for injuries alleged to have occurred several years prior thereto. In September, 1915, by an order of the federal court a receiver was appointed for the railway company, and all the property and assets of the corporation of every kind and nature, and wherever situated or found, was by the order of the court taken out of its hands and turned over to the receiver, who was ordered to operate the same.

The summons was served upon E. R. Lane, and the return recites that—

"The said E. R. Lane being the general station agent and representative of said defendants and each of them in said capacity, the president, vice-president, treasurer, secretary, chairman of the board of directors or other chief officers not being found in my county and the said defendants, or either of them, not having designated any person or officer upon whom service of process could be made under the provisions of the statute."

Section 72 of the civil code (Gen. Stat. 1915, § 6963), which provides for the manner of service of summons on a railroad corporation, reads:

"Such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets or station-keeper of such company or corporation in such county, or such process may be served by leaving a copy thereof at any depot or station of such company or corporation in such county, with some person in charge thereof and in the employ of such company or corporation, and such service shall be held and deemed complete and effectual."

It is the contention of plaintiff that the testimony taken on the hearing of the motion conclusively establishes that E. R. Lane, at the time the summons was served, was the station agent of the defendant. He testified in substance that the duties performed by him in the office and at the station had been the same during the last five years, and that after the appointment of the receiver he had performed certain services for the railway company, which consisted in looking after a number of collections for services rendered by the railway company previous to the appointment of the receiver; that he

had never been discharged by the railway company, except as he was notified by a circular letter sent to all the employees at the time the receiver was appointed. There is a stipulation that after the receivership the name of the Missouri, Kansas & Texas Railway Company remained uncanceled on all stationery and forms of printed blanks, just as it had been previous to the appointment of the receiver.

The findings of the court are that the receiver took charge of the property about September 26, 1915, and that E. R. Lane proceeded to look after the business under the employment of the receiver, otherwise performing practically the same duties as those he had been performing in the past; that other than by circular letter to all the employees notifying them of the receivership, he had not been formally discharged by the company; and that in the first two or three months following the receivership he collected a number of small items of freight and remitted them to the railway company, as he was directed to do as general freight and ticket agent at Columbus, and that he was receipted for the same by the railway company and not by the receiver.

In our opinion the order setting aside the service must be affirmed. Whatever duties the station agent performed after the appointment of the receiver he performed as agent of the receiver. Under the terms of the order appointing the receiver, the station agent was not in a position where, in the conduct of the same business, he could serve two masters. All the property and assets of the defendant company were taken out of its control and placed in the hands of the receiver to control and operate. If all the former employees of the railway company continued to be the agents of the company until they could be individually notified of their discharge and re-employment by the receiver, an intolerable situation would arise, not contemplated by the order of the court, and one which would benefit neither the public nor the property. No formal discharge by the railway company of its former employee was required in order to sever the relation of employer and employee. That resulted immediately on the making of the order appointing the receiver. The railway corporation was not dissolved by the appointment; it still exists as a legal entity, and it may have agents for certain purposes; but no

person in the employ of the receiver in operating the railway or in handling any of the assets or property of the railway company can be regarded as the agent of the company, merely because of the duties performed by him. Whatever any servant, agent or employee does in connection with the operation or control of any of the assets or property of the railway company is performed as agent of the receiver, and not of the company.

The fact that the name of the railway company remained on the blanks used by the receiver in the conduct of the business is of no probative force, any more than the fact that the name on the cars and engines of the company was not changed. In *Railway Co. v. Smith*, 59 Kan. 80, 52 Pac. 102, the question arose over the admissibility of testimony to the effect that the engine causing the injury was a Union Pacific engine, and that the employees were employees of the Union Pacific, and it was said in the opinion:

"In speaking of a railroad in the hands of receivers, it is usually designated by the name of the road, or of the corporation owning it, rather than that of the receivers. No confusion ordinarily arises, and there is none in this case. Proof that the property was Union Pacific property was competent evidence against the receivers, whose duty it was to have charge of the property. Proof that the employees were Union Pacific employees was good proof that they were employees of the receivers, when the fact became clearly established that the receivers had entire and exclusive control of all the properties of the company and of the transaction of all its business." (p. 85.)

In *Railway Co. v. Bricker*, 65 Kan. 321, 69 Pac. 328, the question involved was whether or not an employee of the receiver was also an employee of the corporation, the principal contention being that the corporation was not liable for an injury occasioned by the negligence of the employees of the receiver. It was said in the opinion:

"The principle of *respondet superior* has no application. The receivers were the officers of the court and not the agents of the corporation, and the corporation is not, therefore, liable for the acts of the receivers or the acts of their employees." (p. 326.)

Because the corporation could only be liable in consequence of some negligence of its own agents or employees, it was held that the company was not liable. It was said in the opinion:

"The plaintiff, when injured, was not an employee of the corporation

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and his injuries are not the result of the negligent act of any agent of the corporation or of the mismanagement of any engineer or employee of the corporation." (p. 327.)

The same question involved here has arisen in a number of cases. The decisions, however, are controlled by statutes, some of which differ from our provisions as to the manner of service upon a railway company. A case directly in point is *Cain v. Seaboard Air-Line Railway*, 7 Ga. App. 461. It was there held that—

"Service of a suit against a corporation in the hands of a receiver, by serving an agent of the receiver, which agent had formerly occupied the same position for the corporation, is not good service as to the corporation, (a) because, in order for service upon a corporation to be effective by reason of service upon an agent, the agent must at the time of service be in fact the agent of the corporation; and (b) because when a corporation is in the hands of a receiver who is conducting its business, the agents and employees are no longer those of the corporation, but are the agents of the receiver. *Cherry v. N. & S. Railroad Co.*, 59 Ga. 446; *Henderson v. Walker*, 55 Ga. 481; *Ocean Steamship Co. v. Wilder & Co.*, 107 Ga. 220." (p. 462.)

It is argued that the court committed error in ignoring certain presumptions. It is said in the briefs:

"That it is the legal duty of a sheriff, in serving papers, to make due inquiry as to the identity of the person on whom such papers are served, and in all cases, until the contrary is shown by a clear preponderance of the evidence, the presumption is that such officer has performed his duty and his return speaks the truth."

The sheriff made due inquiry as to the identity of the person on whom he served the papers, and there is no question as to the correctness of the return in this respect. He did, in fact, serve the papers on E. R. Lane, who was the station agent; but when the order of the court appointing the receiver was introduced in evidence it was shown that the sheriff was mistaken in stating that Lane was the agent of the railway company.

It is seriously contended that because the court reserved the right to modify the order and to enlarge or diminish the duties of the receiver, it devolved on the defendant to show that some other order had not been made in the meantime authorizing the railway company to operate or control its property. The presumption, however, is that the order continued in force and

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effect until the contrary is shown. Again, it is said that "there is no evidence, properly admitted, even tending to overturn the presumption that the receiver acted within his authority when he permitted the railway company, through its agent, Lane, to remain" at the station and "collect for it outstanding accounts, etc." The contention begs the question by assuming that Lane was the agent of the railway company.

The judgment is affirmed.

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No. 21,241.

EMMA MAE TOWNSEND, *Appellee*, v. C. A. SEEFELD, *Appellant*.

SYLLABUS BY THE COURT.

1. **MALICIOUS ASSAULT—*Damages—Instructions.*** The instructions given, none being requested by the defendant, sufficiently covered the issues between the parties and fairly stated the law.
2. **SAME—*Evidence—Findings—"Smart Money."*** The findings, in accordance with the evidence of the plaintiff, convicted the defendant of such malicious and oppressive conduct as justly to render him liable to the imposition of smart money.
3. **SAME—*Actual Damages—Mental and Physical Suffering.*** The allowance of actual damages was properly based on physical and mental suffering caused by the defendant's conduct, and not alone on nervous shock.
4. **SAME—*Injuries Result of Assault.*** While the plaintiff received from the defendant no wound or bruise, the result of his conduct was a miscarriage accompanied with very severe pain. *Held*, that such result cannot be classed as mental suffering.
5. **SAME—*Financial Condition of Defendant—Proper Subject of Inquiry.*** It was proper to inquire into the financial condition of the defendant to the end that the finding as to punitive damages might be intelligently made.

Appeal from Rooks district court; CHARLES I. SPARKS, judge. Opinion filed January 12, 1918. Affirmed.

David Ritchie, of Salina, and O. O. Osborne, of Stockton, for the appellant.

W. L. Sayers, of Hill City, and F. E. Young, of Stockton, for the appellee.

The opinion of the court was delivered by

WEST, J.: The defendant, a constable, holding an execution against S. A. Townsend, undertook to levy it on an automobile which the plaintiff claimed and claims to own, and for the alleged forcible and malicious taking of which the plaintiff brought this action. She recovered and the defendant appeals.

The plaintiff testified in substance that the constable came to her husband's livery barn and said he was going to levy on the Ford automobile, and was told by plaintiff that it belonged to her and she did not want him to levy on it, that there was another automobile in the shed that he could levy on but that the Ford was the only thing "we have to make a living for the family."

"I saw the switch key to the car, and got it into my possession; after getting the switch key I had it in my hand; my hand in my apron pocket; I had on a big kitchen apron, and I just ran my hand in the pocket and rolled my hand up this way (indicating) in the apron, and stayed there; I think it was my left hand. Seefeld then asked me for the switch key, and I did not give it to him. After refusing to give it to him, he kept talking to me, and asking me for the switch key. He said, give me the switch key, and I said, No, I won't, and he looked awful and grabbed hold of me and . . . threw me down toward the ground, and my hands came out of the apron, and he grabbed the switch key."

On cross-examination she testified:

"I did not fall, did n't step forward, I did not move my feet. I was just scared. He did not throw me out of balance. Mr. Seefeld got the key, and I was standing there yet, and just as soon as he could get the switch and cranked the car he took it."

She testified that a miscarriage followed.

The jury returned a verdict for \$500 actual and \$300 exemplary damages, and made among others the following special findings:

"3. If you answer question two, yes, then did the defendant use any more force in taking possession of the automobile than was reasonably necessary to accomplish his purpose? Ans. Yes.

"4. If you answer question number three, yes, then state in what particular such force was excessive? Ans. In the violent manner in which he took the switch key.

"5. Did the defendant, C. A. Seefeld, in whatever he may have done, in the taking of the automobile in question, act in good faith, believing that he had a right to do what he did do? Ans. No."

Further, that the defendant had no reasonable ground for believing that the Ford was the property of the husband, that he was guilty of fraud, malice, gross negligence, or oppression by reason of not investigating the ownership of the car after being informed by the plaintiff that it belonged to a third party. Also that the \$500 was allowed for severe nervous shock, great physical and mental agony and for injured health, that the levy had not been made when the switch key was taken by the husband, and that the plaintiff suffered injury by the act of the defendant in forcibly wresting the switch key from her.

Assignments of error call attention to permitting the cross-examination of a witness, to certain instructions, to the matter of damages actual and exemplary, and to the denial of the motion for a new trial.

The first question presented in the brief is the failure of the court to instruct without request that the miscarriage alleged to have been suffered by the plaintiff was the proximate result of the defendant's conduct in taking the automobile, and it is complained that the court did not give any instructions whatever upon the material issues in the case or what was necessary for the plaintiff to prove before she was entitled to recover. An examination of the charge given, none being requested by the defendant, shows that the claims of the parties as set forth in their pleadings were stated to the jury, the duty of the defendant in making the levy, and that the jury were told that if they found from the evidence that he was acting under a valid execution but with malice, gross negligence, fraud, or oppression and without regard for the rights of the plaintiff they would be justified in awarding her exemplary damages if they should find her entitled to any actual damages. Detailed instructions were given touching the rights of the parties regarding the switch key, the authority of the constable under his execution, and even the validity of the judgment back of it, and the jury were charged that the burden was on the plaintiff to make out her case by a preponderance of the evidence. Indeed seven pages of the abstract are taken up with the thirteen instructions given, and it is not strange that with this prolixity no additional instructions were requested. Those given fully comply with the statutory

requirement to give general instructions upon each material issue. (See *Hamilton v. Railway Co.*, 95 Kan. 353, 357, 148 Pac. 648, and cases cited.)

The second complaint in the brief is that neither the evidence nor the findings sustain the allowance of \$300 exemplary damages, although the jury found the defendant guilty of fraud, malice, or oppression in not investigating the ownership of the car after being informed that it belonged to a third party. The plaintiff testified that after the key was taken away from her she suffered some pain and felt deadly sick for a few minutes as if she were going to die, which feeling continued until she miscarried, and that the sufferings during this time were much greater than at natural childbirth, she having borne six children. The findings, as already indicated, are in no wise inconsistent with this evidence, but are supported thereby as to the physical and mental shock and suffering. (See *Whitsel v. Watts*, 98 Kan. 508, 159 Pac. 401, and cases cited.)

It is plausibly argued that as the jury limited the fraud, malice, and oppression to the failure to investigate the ownership of the car, this amounts to a repudiation of actual fraud, malice, or gross negligence, but under the familiar rule requiring the findings and evidence to be harmonized if reasonably possible, the view must be taken that the jury deemed the constable to have proceeded maliciously and oppressively to take the car from the plaintiff regardless of her claim of ownership and after being informed thereof, and this, including "the manner in which he took the switch key," was such conduct as merited punitive damages.

It is suggested that according to the testimony of one witness the constable had been informed that the license for the car was in the name of the husband, and that we should take judicial notice that this implied an application previously made by him to the proper officers for such license with the sworn statement to them that he was the owner of the car. But whatever application or affidavit may have been made by some other person, the plaintiff was on the ground claiming ownership and had possession of the key by which the car could be operated, and overruling and overcoming such claim and



possession the constable, instead of calling upon his judgment creditor for indemnity, proceeded on his own responsibility to act in the way he did, with the disastrous results indicated by the evidence and evidently believed by the jury.

It is next contended that the allowance of \$500 actual damages cannot be sustained, for the reason that severe nervous shock appears to be one of its elements, and that unless accompanied by physical injury such shock cannot be the basis of such recovery. While under some circumstances at least the rule contended for is enforced, the jury in this case properly concluded from the evidence that the physical and mental shock and suffering were both the result of the defendant's conduct. It is said to be absolutely clear from the record that there was no physical injury of any kind accompanying the so-called nervous shock by taking the switch key. It is true there was no wound or bruise on the body of the plaintiff caused thereby, but according to her testimony severe miscarriage pains immediately ensued, and it will not do to say that these were mental and not physical.

Lastly, complaint is made because the court received testimony on cross-examination of the defendant as to his financial worth. Counsel say that damages should not be figured upon the basis of what the defendant is worth, but upon the basis of what the plaintiff has been injured. But the theory on which smart money is allowed is that in addition to responding for actual damages the defendant, on account of the maliciousness of his conduct, ought to be punished. (8 R. C. L., p. 581, § 129.) It is entirely logical that in order to know what amount would really cause a smart to the defendant his financial condition should be somewhat understood, because what would be the merest annoyance to one might mean bankruptcy to another. Hence, it is the rule that in cases of this kind the financial standing of the defendant may be considered. (*White v. White*, 76 Kan. 82, 90 Pac. 1087; 8 R. C. L., p. 607, § 152.)

In view of the foregoing, no error is perceived in the ruling of the court denying a new trial.

The judgment is affirmed.

No. 21,247.

CLAYTON L. STUART, *Appellee and Appellant*, v. THE CITY OF KANSAS CITY, *Appellant and Appellee*.

## SYLLABUS BY THE COURT.

1. **WORKMEN'S COMPENSATION ACT—*Injuries from Sportive Acts of Co-employee—Liability of Employer.*** An employee was injured by having mortar playfully or wantonly thrown into his eye by a fellow workman. The injured employee was at the time engaged in his regular work of mixing and carrying mortar. The fellow workman was in the habit of playing pranks and jokes on the other workmen, and that habit was known to the immediate superiors of the injured employee. The employment was governed by the workmen's compensation act. *Held*, that the injured employee is entitled to compensation under that act for the injuries inflicted on him; and further *held*, that the mere fact that an injury to an employee is occasioned by the sportive or malicious act of a fellow employee does not of itself establish that the injury arose out of the employment.
2. **SAME—*Accident in Course of Employment—Compensation.*** Under the workmen's compensation act, a workman who is injured by accident arising out of and in the course of the performance of his labor is entitled to compensation, although he cannot explain how the accident occurred.
3. **SAME—*Judgment Not Excessive.*** The amount of compensation fixed by the judgment does not appear to be excessive.

Appeal from Wyandotte district court, division No. 3; ALBERT J. HERROD, judge. Opinion filed January 12, 1918. Reversed.

*H. J. Smith, Thomas M. Van Cleave, and Lee Judy*, all of Kansas City, for the appellant and appellee.

*J. O. Emerson, and David J. Smith*, both of Kansas City, for the appellee and appellant.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff recovered judgment under the workmen's compensation act for \$1,690, and the defendant appeals.

The plaintiff was employed by the defendant as a laborer in the defendant's water and light department, and at the time

of the injury which is the basis of this action the plaintiff was engaged in mixing and carrying mortar to other workmen who were repairing boilers in the defendant's plant. The other workmen were working about twenty feet above the ground. After mixing the mortar, the plaintiff carried it in a bucket to a hook on the end of a rope and attached the bucket thereto, and William Deeds, one of the workmen, elevated the mortar and delivered it to other workmen who were laying brick. Just before he was injured, the plaintiff had taken a bucket of mortar and attached it to the rope, and had then stepped back about twenty-five feet and looked up toward William Deeds to see when the bucket was returned, and to ascertain if he wanted anything; while thus standing, a piece of green mortar, made of lime, sand, and cement, fell or was thrown into the plaintiff's eye, which was thereby seriously injured.

On the trial, the plaintiff, in substance, testified that he supposed, but did not know, that Deeds threw the mortar. The plaintiff testified, in part, as follows:

"Q. Did you see Mr. Deeds just before you were hit? A. Yes, sir.

"Q. What was he doing? A. Standing up on this platform.

"Q. Was he making motions of any kind? A. No.

"Q. Had he made any? A. Well, just before this fell in my eye he got down on his hands and knees and looked under the platform and made circular swing with his right arm as though reaching for something; might have tossed something out of his hand, I could n't say.

"Q. Did you see any mortar leave his hand? A. No, sir.

"Q. Did you see any in it? A. I did n't see any in it.

"Q. You thought at the time he did throw it, did you? A. Yes, I thought at the time he threw it."

There was abundant evidence, largely in the nature of admissions made by the plaintiff, to show that Deeds had playfully thrown the mortar.

There was evidence to show that Deeds was playful, sportive, and inclined to play pranks or jokes on his fellow workmen, and that this was known by his immediate superiors at the plant.

The jury answered special questions as follows:

"Question 1: Did the injury to the plaintiff arise out of and in the course of his employment? Answer: Yes.

"Question 2: How many weeks has the plaintiff been totally incapacitated for labor beyond a period of two weeks next succeeding the date of the injury, if any? Answer: Seventeen weeks.

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"Question 3: Will the plaintiff continue to be totally incapacitated for labor in the future, and if so, for how many weeks do you find such total incapacity will, in all probability, continue? Answer: Not totally incapacitated.

"Question 4: How many weeks in all do you find the plaintiff has been and will in all probability be partially incapacitated in the future, beyond the period for which you allow him for total incapacity, if any? Answer. 397 weeks.

"Question 5: What is the average weekly wages received by plaintiff in his employment for fifty-two weeks next prior to the date of the injury? Answer: \$12.00 per week.

"Question 6: If you find the plaintiff is partially incapacitated from labor by his injury, state what he would probably be able to earn on an average per week at any suitable employment during the period of such partial incapacity, which period must not extend beyond eight years after the date of the injury? Answer: \$4.00 per week."

1. The defendant's argument is principally based on the theory that Deeds, in a spirit of sport, threw the mortar at the plaintiff, and that the mortar hit the plaintiff in the eye. The defendant contends that it is not liable for an injury inflicted on one of its workmen by another workman, when the latter injures the former by some prank, sport, or play, or even by an assault. The matter now complained of was presented to the trial court in a number of forms. (1) At the close of the plaintiff's evidence, the defendant asked that the jury be instructed to return a verdict in favor of the defendant. The request was refused. (2) At the close of all the evidence, the defendant again asked that the jury be instructed to return a verdict in favor of the defendant. The request was again refused. (3) The defendant requested an instruction, substantially, that if the plaintiff's injury was caused by a fellow employee throwing mortar at the plaintiff, either maliciously or in sport, the plaintiff could not recover for the resulting injury. No such instruction was given. The court instructed the jury as follows:

"You are further instructed that before the plaintiff is entitled to recover he must show by a preponderance of the evidence that the accident complained of is one which arose out of and in the course of his employment, and in this connection you are instructed that if you find from the evidence that one Deeds, a fellow workman of the plaintiff engaged in the same line of employment, and while so engaged either intentionally or accidentally struck the plaintiff in the eye with a piece of mortar, injuring him, you must find that the injury arose out of and in

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the course of the employment of the plaintiff, and if such injury resulted in incapacity to perform labor for a period beyond two weeks from the date of such injury he would be entitled to compensation."

This instruction did not correctly state the law. The first section of the employers' liability act, section 5896 of the General Statutes of 1915, reads, in part, as follows:

"If in any employment to which this act applies, personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation to the workman in accordance with this act."

A clear and concise statement of the law governing compensation for injuries to employees caused by play is found in Workmen's Compensation Acts, a Corpus Juris Treatise, by Donald J. Kiser, page 79, and is as follows:

"An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee, or whether the employee takes no part in it. If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise 'out of the employment,' and the employee is not entitled to compensation therefor, unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees."

The rule there declared is supported by *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686; *McNicol's Case*, 215 Mass. 497; *Scott v. Payne Bros.*, 85 N. J. L. 446; *In re Loper*, (Ind. App.) 116 N. E. 324; *Clayton v. Hardwick Colliery Co.*, 85 L. J. K. B. 292. Under these authorities the rule is that where a workman, known by his master to be in the habit of indulging in dangerous play with his fellow workmen, is retained in the master's employ, the danger of injury from such play becomes an incident of the employment of the other workmen, and injury to any of the other workmen, while performing his regular work, caused by such play, comes within the provisions of the workmen's compensation act.

2. Another matter urged by the defendant is that the plaintiff is not entitled to recover under his theory that he did not know whether the mortar was thrown at him by Deeds, or whether the mortar, by some accident, fell from above. In his brief the plaintiff says:

"It was one of the very few disputed facts in this case as to whether

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the mortar which hit the plaintiff in the eye and inflicted the injury upon him was thrown by Mr. Deeds from the elevated platform or not. The plaintiff did not admit that Deeds threw it although he stated that it was his opinion at the time that it had been thrown by Deeds. He, nevertheless, stated that he did not see any mortar in Deeds' hands or see any mortar coming from Deeds toward him, and the defendant's attorney, in his opening statement, said that he thought Deeds denied having thrown the mortar."

On this phase of the case, the defendant requested the following instruction:

"The court instructs the jury that the burden is upon the plaintiff to show that his injury resulted from an accident which arose out of and in the course of his employment, and if you are unable to determine from the testimony whether or not the accident in question was one which arose out of and in the course of his employment, then, under no circumstances is plaintiff entitled to recover and your verdict shall be for defendant."

This instruction was not given.

The defendant's position is not tenable. The plaintiff was engaged in the performance of his labor. If Deeds did not throw the mortar, it fell from the place at which Deeds and the masons were working. It follows, then, that the plaintiff was injured by accident arising out of and in the course of his employment. This brings the injury to the plaintiff within the provisions of the statute, and renders the defendant liable for compensation in this action.

3. The defendant insists that the verdict was excessive. Why or wherein it was excessive is not shown.

The jury found the period of total incapacity, the period of partial incapacity, and the wages that the plaintiff will probably be able to earn in some suitable employment during the period of his partial incapacity. If these facts are taken, and the rules for calculating the amount of compensation as given in sections 5905 and 5906 of the General Statutes of 1915 are followed, it will be found that the amount of compensation fixed by the judgment was correct.

Because of the error in the instructions, the judgment is reversed and a new trial is granted.

No. 21,250.

J. B. LADD, *Appellee*, v. F. W. FLATO, *Appellant*.

## SYLLABUS BY THE COURT.

APPLICATION FOR CONTINUANCE—*Bad Faith*. Record examined, and held sufficient to justify the trial court's decision that an application for a continuance on account of sickness of a litigant was not made in good faith; that the pretended sickness was only feigned; and that the purpose of the application was merely to hinder and delay the administration of justice.

Appeal from Greenwood district court; ALLISON T. AYRES, judge. Opinion filed January 12, 1918. Affirmed.

O. C. Zwicker, of Eureka, for the appellant.

D. H. Branaman, of Topeka, and Howard J. Hodgson, of Eureka, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The only question here concerns the propriety of the trial court's refusal to grant a continuance.

The plaintiff sued the defendant for the half of a commission on a sale of real estate. At a first trial of the action there was a verdict for plaintiff, but it was for an inadequate sum and was set aside and a new trial awarded. The second trial was set for October 11, 1916, the plaintiff coming all the way from Minnesota to attend it. On the day set for the trial, the defendant, who resided in Kansas City, Mo., sent a telegram from Alamosa, Colo., stating that he was sick and unable to attend court, and that he was sending an affidavit by mail. This telegram was presented to the court, and an oral application was made for a continuance. Counsel for plaintiff immediately telegraphed an attorney in Alamosa to ascertain the facts. This Colorado attorney investigated and promptly telegraphed an answer, that defendant looked well but had refused to let a physician examine him. The telegram of inquiry and answer were also presented to the court, and thereupon the application was denied and the cause proceeded to trial and judgment.

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On the hearing of the motion for a new trial, the facts of defendant's pretended sickness were thoroughly aired. Defendant and his personal physician made affidavits showing defendant's sickness at and about the time of the trial. The physician swore that defendant was under his care from October 7 until October 14. Plaintiff produced affidavits of persons who knew defendant and who had seen him on October 11, 1916, and during some days prior thereto, and afterwards in Alamosa, Del Norte, and Antonito, Colo.; that he was then apparently in good health; that he took his meals at a hotel in Alamosa; that he attended a fair at Del Norte, thirty miles away, having journeyed thereto by train; and that he was in Antonito, twenty-nine miles from Alamosa, on October 12, apparently in good health. Other circumstances were shown which tended to discredit the good faith of defendant's physician and to discredit his certificate and affidavit. Under this showing it must be held that there was ample evidence to justify the trial court in holding that on October 11, 1916, the defendant was not sick and unable to come and attend to his lawsuit, and that he had only been feigning sickness to hinder and delay the administration of justice.

Judgment affirmed.

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No. 21,252

*In re* THE ESTATE OF HOWARD W. HEIVLY, an insane person (EMMA E. HEIVLY, *Appellant*, v. M. M. MILLER, as Guardian, etc., *Appellee*).

SYLLABUS BY THE COURT.

**DIVORCE—Decree—Property Rights Determined—Res Judicata.** Following the rule stated in *Roe v. Roe*, 52 Kan. 724, 35 Pac. 808, it is held that a judgment in a divorce action, making a division of property and reciting that it was a final and full adjustment of all property rights and claims between the parties, is a bar to a recovery upon an allowance previously made by the probate court to the wife against the estate of the husband for expenses that were incurred and paid while the marriage relation existed and while she was guardian of his person and estate, and before the divorce was granted.

Appeal from Shawnee district court; ALSTON W. DANA, judge. Opinion filed January 12, 1918. Affirmed.



*W. F. Schoch, and J. K. Rankin*, both of Topeka, for the appellant.

*D. H. Branaman, and J. B. Larimer*, both of Topeka, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: The principal question involved in this appeal is the right of a divorced woman to recover upon a claim against her former husband, where the court in the decree of divorce expressly determines and settles property rights existing between the parties.

It appears that the parties were married in 1892 and that two children were born to them. In 1907, about fifteen years after their marriage, the husband was adjudged to be insane and his wife was appointed guardian of his person and estate, and continued to act in that capacity until May 19, 1913. At that time she made a final settlement, and the probate court made her an allowance against his estate of \$3,251.48. The basis of this claim was expenses of the family, taxes paid and repairs made on the homestead, which she and her children occupied during his disability. These expenses accrued and were paid after he was adjudged to be insane. About a week after the guardianship was closed and the final settlement made, and while her husband was still insane, she brought an action for divorce, alleging misconduct that occurred before he became insane. A divorce was granted, and a division of the property of the parties was made. The property consisted chiefly of a homestead, which was acquired as the result of their joint earnings, which had a rental value of \$40 a month, a beneficiary certificate on which the company had been paying her a weekly benefit of \$4 a month during his incapacity, and an insurance policy of \$1,000 on the security of which she had borrowed the sum of \$330. In the division of property the court awarded the property to her, but required her to pay him the sum of \$1,000, and payment of this sum was made by her. No special mention was made in the decree of the allowance against him, which she had obtained in the probate court, but it was expressly declared that "the division and adjustment of property heretofore and now made shall be a final and full adjustment of all property rights and claims between said

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parties." About two years afterwards, and on March 13, 1916, an inquiry as to his mental condition was made and it was adjudged that he had been restored to his right mind. Some time after the divorce he inherited an undivided interest in land in Missouri, and a part of the thousand dollars which she had paid to him remained in the hands of the guardian appointed to succeed her, when her application under review was made. She asked the probate court to require the guardian of his estate to apply any cash on hand to the payment of her allowance of \$3,251.48, and also that he proceed to sell the real estate in Missouri for the purpose of paying her claim. The application was denied by the probate court, and she then appealed to the district court. From its decision denying her application she brings the case to this court.

It is contended by the plaintiff that the allowance by the probate court is as conclusive upon the parties as a judgment of the district court. Assuming that it was as conclusive as plaintiff contends, it must be held that her rights in the claim were finally and fully determined by the judgment rendered when the divorce was granted. The decree purports to dispose of all property rights of the parties and of every claim existing between them. The terms of the decree cover adjudicated claims as completely as claims or rights which had not been determined by a court. The facts in the case bring it within the rule stated in *Roe v. Roe*, 52 Kan. 724, 35 Pac. 808, that "the final judgment in an action granting a divorce settles all property rights of the parties, and is a bar to an action afterward brought by either party to determine the question of alimony, or any property rights which might have been settled by such judgment." (Syl. ¶ 2.) In this case the plaintiff's claim might not only have been settled in the action of divorce, but the court in its judgment declares that all property rights have been determined and all existing claims adjusted. The statute authorizes such an adjudication of property rights when a divorce is granted and, besides, as stated in *Roe v. Roe*, supra, "it is the general policy of the law, strongly adhered to by this court in its prior decisions, to require every question properly involved in any suit to be disposed of by the judgment finally rendered in the case." (p. 728.) The *Roe* case must be regarded as a controlling authority in this one.

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Some decisions reaching a different result have been cited by plaintiff, but they are based on statutes differing from our own. The principal authority relied on by plaintiff is *Scott v. Scott*, 83 Conn. 634, in which it was held that an allowance of alimony to a wife in a decree of divorce does not bar a recovery of a debt due from the husband to the wife when the decree was rendered. Although this decision appears to be in conflict with the rule in the *Roe* case, it may have been affected by the Connecticut statute which provides that upon granting a divorce the court may assign to the woman a part of her husband's estate, not exceeding one-third of it. No provision is made for a division of the property of both parties, but the decree operates as a partition, between husband and wife, of his property. Our statute provides that of—

“such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof.” (Gen. Stat. 1915, § 7581.)

Even if the decision in the *Scott* case may be considered as in conflict with the ruling in the *Roe* case, it does not incline us to overrule or modify the latter ruling. About twenty years after the case was decided the question involved came up again for consideration, and the doctrine of the case was approved and followed. (*McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546.)

The judgment of the district court is affirmed.

No. 21,258.

*In re* the Estate of W. W. BAIRD, deceased (JAMES H. ELLIOTT, as Administrator, etc., *Appellant*, v. SARAH BAIRD et al., *Appellees*).

## SYLLABUS BY THE COURT.

**ADMINISTRATOR—Order of Probate Court—Appeal by Administrator—Appeal Bond Required.** An administrator who appeals to the district court from an order of the probate court, which charges him with interest on certain funds, deducts the interest charges from an allowance of compensation previously made, and directs distribution of the estate, is required to give an appeal bond.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed January 12, 1918. Affirmed.

A. H. Skidmore, and S. L. Walker, both of Columbus, for the appellant.

Edward M. Tracewell, of Columbus, for the appellees.

The opinion of the court was delivered by

BURCH, J.: This appeal was taken by the administrator of an estate from an order of the district court dismissing his appeal from an order of the probate court, for failure to give an appeal bond.

The administrator presented to the probate court the final report and account of his administration. After a hearing, the probate court charged the administrator with interest on funds which he had permitted to lie idle, and charged him with another item of interest accruing under circumstances not now material. The court ordered the sum of the two charges to be deducted from an allowance of compensation to the administrator for his services, fixed by previous order, and directed distribution to the heirs.

The statute reads as follows:

"Every appellant shall file in the probate court a bond in such sum and with such security as may be fixed and approved by the probate court, conditioned that he will prosecute the appeal and pay all sums, damages and costs that may be adjudged against him: *Provided*, No executor or administrator shall be required to enter into bond to entitle him to appeal, except when he appeals from the order of removal or to pay over

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money to heirs, legatees, devisees, or in a suit growing out of an alleged maladministration of said executor or administrator, in which said cases he shall be required to give bond." (Gen. Stat. 1915, § 4678.)

The appeal to the district court was essentially an appeal from the order to pay to the heirs a sum of money augmented by interest charges which the administrator claimed were unwarranted, and so was within the terms of the statute. Beyond this, however, the statute was designed to relieve an administrator from giving bond when appealing in his representative capacity for the benefit of the estate. In this instance the appeal was taken for the personal profit and advantage of the administrator, and in opposition to the interest of the estate.

In a discussion of the subject in the probate court, opinions were expressed by various persons, including a representative of the heirs, to the effect that no bond was necessary to perfect the appeal. The district court could acquire jurisdiction only by virtue of a bond, and not by virtue of a supposed waiver or estoppel resulting from the conduct described.

The judgment of the district court is affirmed.

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No. 21,434.

THE STATE OF KANSAS, *ex rel.* H. O. CASTER, as Attorney for the Public Utilities Commission et al., *Plaintiff*, v. THE SOUTHWESTERN BELL TELEPHONE COMPANY, *Defendant*.

SYLLABUS BY THE COURT.

1. UTILITIES COMMISSION — *Order May be Enforced by Mandamus.* This court has jurisdiction to enforce by mandamus an order of the utilities commission, notwithstanding the pendency in the district court of an action to enjoin its enforcement.
2. SAME—*Telephone Service Discontinued—Restoration Ordered—Order Not Enforced by Mandamus.* In mandamus to require a public utility to reestablish a service or practice which it has discontinued without the consent of the utilities commission, no inquiry will ordinarily be made into the question whether such service or practice is one which the utility should be or could be compelled to maintain permanently, that being a question to be passed upon in the first instance by the commission; but where the utility has already, in a proceeding before the commission to which it was made a party, shown to that tribunal the existence of facts that would have compelled the grant-

ing of such consent if it had been asked, obedience to an order of the commission directing the restoration of the service will not be compelled by mandamus, merely because of the failure of the utility to procure such consent in advance.

3. **TELEPHONE COMPANY—*Gratuitous Service—Discriminating Practice.*** The gratuitous allowance by one telephone company of the use by another company of a line owned by it, constitutes a discriminating practice forbidden by the statute, and therefore is not one which the utilities commission can require to be continued.
4. **SAME—*Dismantling Telephone Line—Another Efficient Line Established.*** The dismantling of a direct telephone line between two places does not constitute an objectionable change in a practice pertaining to service, where the company owning it has established another line, although not a direct one, between such places, by means of which all business between them is efficiently handled, without detriment to the public or to individuals.

Original proceeding in mandamus. Opinion filed January 12, 1918. Writ denied.

*F. S. Jackson*, and *H. O. Caster*, both of Topeka, for the plaintiffs.

*J. W. Gleed*, *C. J. Evans*, and *D. E. Palmer*, all of Topeka, for the defendant.

The opinion of the court was delivered by

MASON, J.: This is an original proceeding in mandamus, brought by the public utilities commission to compel the South-western Bell Telephone Company to obey an order made by the commission requiring it to rebuild a telephone line between Garnett and Lone Elm. It is submitted upon certain stipulations and the evidence taken before the commission prior to the making of the order.

The line (of iron wire) was built in 1900 by a local company which owned an exchange at Garnett. The subscribers to that exchange and to the one at Lone Elm, which lies fourteen miles due south, were allowed the use of it without charge, except as a charge may be deemed to have been included in their regular telephone rental. In 1905 the defendant (or a company of which it is the successor) purchased the Garnett exchange, with the line to Lone Elm. After this purchase the Bell company accepted calls for Garnett from Lone Elm over

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this line without making a charge therefor. This practice continued until sometime in 1915, although the Bell company and the Anderson County Telephone Company, which owned the exchange at Lone Elm, had in the meantime entered into a written contract fixing rates for toll calls, which apparently was intended to cover all business of that character, no exceptions being stated, and no specific reference being made to the line from Garnett to Lone Elm. In July or August, 1915, a storm destroyed a part of the line, and while there is some evidence that communication was once established after that, the poles were in such condition that its continued use would have required it to be practically rebuilt. The Bell company thereupon dismantled it.

In October, 1916, the Lone Elm company (known as the Anderson County Telephone Company) complained in writing to the utilities commission of this discontinuance, and asked for a restoration of "free exchange to Garnett and connecting lines." An amended complaint was filed later asking that service be restored over the line referred to "at the rate of ten cents per message, with a twenty-five per cent commission on originating call." A hearing on these complaints resulted, as already indicated, in the making of the order which is now sought to be enforced. The Bell telephone company within due time began an action in the district court, which is still pending, to enjoin the enforcement of the order. The present proceeding has been brought upon the theory that the controversy turns upon a pure question of law, the final decision of which can be reached more quickly and conveniently by this course. The evidence taken before the commission was to the effect that the Bell company maintains toll service between Lone Elm and Garnett by means of a copper wire metallic circuit through Iola, which lies some fifteen miles southeast of Lone Elm; that the service over this line is prompt, efficient, and adequate, the charge being fifteen cents a message; that all the calls between the two points can be readily handled with the present facilities; that the business would not yield a reasonable return on the investment required to rebuild the old line. The order sought to be enforced appears not to be based upon any doubt as to the existence of these facts, but is explicitly rested upon the proposi-

tion that the defendant violated the law in discontinuing its former practice without obtaining the consent of the commission.

1. A preliminary question is raised by a motion to quash the alternative writ on the ground that action by this court is precluded by the pendency of the injunction action in the district court, which is somewhat in the nature of a statutory appeal from the order of the commission. The utilities statute provides that an action to vacate an order of the commission may be brought in any court of competent jurisdiction. (Gen. Stat. 1915, § 8348.) Provision is also made for the enforcement of the order by mandamus (Gen. Stat. 1915, § 8367), but without express reference to the effect of a prior action in another court. The statute creating the board of railroad commissioners provided that notwithstanding the pendency of an action in the district court to set aside an order of that body, mandamus to enforce it could be brought in the supreme court, which was authorized to stay further proceedings in the earlier action. (Gen. Stat. 1915, § 8447.) The public utilities act contains a section reading as follows:

"All laws relating to the powers, duties, authority and jurisdiction of the board of railroad commissioners of this state are hereby adopted, and all powers, duties, authority and jurisdiction by said laws imposed and conferred upon the said board of railroad commissioners, relating to common carriers, are hereby imposed and conferred upon the commission created under the provisions of this act." (Gen. Stat. 1915, § 8328.)

The defendant insists that by its express terms this section merely vests in the utilities commission the powers which the railroad commission had previously possessed *relating to common carriers*, and that it does not have the effect of making the procedure in regard to orders for the regulation of common carriers applicable to those concerning other public utilities. We think, however, that the first clause of the section, by which all laws relating to the powers of the railroad board are "adopted," must be held to mean that all the provisions of the statute with regard to the action of that body, including those relating to the enforcement of its orders, are made applicable (so far as their nature permits) to the new tribunal—the utilities commission. Otherwise, where an order of the commission is in litigation, we should have dif-



ferent systems of procedure, depending upon whether a common carrier or some other utility were affected—a situation not in keeping with the obvious spirit of the enactment. Moreover, the view we have taken accords with the policy of the new law in making its remedies cumulative to those already in existence. (Gen. Stat. 1915, § 8368.)

2. The statute enacted in 1911 provides that “no change shall be made in any . . . rule or regulation or practice pertaining to the service or rates of any such public utility . . . without the consent of the commission,” etc. (Gen. Stat. 1915, § 8347.) It has been held that in an action brought in this court to require a utility to reestablish a service which it had discontinued without the consent of the commission, no inquiry will be made into the question whether the service involved is one which the utility should be or could be compelled to maintain permanently, because that is a matter to be passed upon in the first instance by the commission. (*The State, ex rel., v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544.) In the opinion in the case just cited it was said:

“Let it be granted, as the demurrer does concede, that the maintenance of a telegraph station at Syracuse is unprofitable. All that was necessary for the defendant to do was to make application to the commission, setting up the facts. It would then be the duty of the commission to verify the facts by proper investigation; and if the alleged facts were true and no other lawful interest was materially affected, the commission would be bound to grant the application. If the commission failed to do so, the courts are open and mandamus or other appropriate remedy would speedily redress the telegraph company’s situation. But here the telegraph company gave the commission no opportunity to investigate.” (p. 306.)

The present situation differs materially from that which was there considered, in this: Here everything bearing upon the question whether the utility should be required to continue the service or practice involved has been brought to the attention of the commission, and has been considered and acted upon by it. True, the telephone company has not in so many words asked for leave to discontinue the practice or service, and it has consistently contended (in obvious good faith and with considerable plausibility) that the case is not one in which such permission is necessary. But the company was made a party to a proceeding formally brought before the

commission, in which the issue was whether it ought to be required to reestablish the line between Garnett and Lone Elm. In that proceeding it presented the reasons upon which it based its claim of right to dismantle the line, and the law and evidence bearing upon the matter were fully gone into. It in effect asked the commission to decide that it ought not to be required to continue the service—which is not very different essentially from asking that the commission approve its course, although protesting that it had no authority to do otherwise. The commission has had the opportunity to consider every aspect of the case upon its merits. Assuming that it was the duty of the company to have kept the line in operation at any expense until it had obtained leave to discontinue it, yet if the facts established in a hearing before the commission showed clearly that such permission must necessarily have been granted upon request, it would be allowing considerations of mere form to prevail over those of substance to require the company to rebuild the line as a prerequisite to the commission's applying the law to the facts and declaring that it had then the right to remove it. Such a course could result in no practical benefit to the public, and is not necessary to the vindication of the rule that no change in service may be lawfully made without the consent of the commission. In the Postal-Telegraph case the court did not make an unqualified order for the reinstatement of the abandoned service; it directed the issuance of a writ compelling such action only in case the defendant should omit for thirty days to apply to the commission for leave to discontinue the service there involved. Here such a provisional order is unnecessary because all the facts affecting the duty of the defendant in the matter are fully before the court, in the form of evidence that has already been considered by the commission.

3. The defendant maintains that it had a right to abandon the practice of receiving without charge, calls from Lone Elm over this line because that practice, inasmuch as it involved giving free service, was in violation of the statute prohibiting discrimination in rates. (Gen. Stat. 1915, § 8343.) The plaintiff argues that the service was not rendered gratuitously, but was a part of the benefit the individual subscriber received in consideration for the rental he paid, the advantage

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to the local exchange consisting in the increased patronage which presumably resulted therefrom. The infirmity of this reasoning lies in the facts of the case. The Lone Elm exchange contributed nothing to the building or maintenance of the line. Its subscribers may be conceived as paying it for the use of the wire, but as none of the money reached the Bell company, the owner of the property received no return. The defendant cannot be considered as receiving a revenue from the subscribers to the Garnett exchange, because according to its statement, which is consistent with the evidence, the practice referred to did not obtain as to them. The service having been furnished without compensation in any form was in violation of the letter and spirit of the statute, and therefore was not one the commission could require to be maintained.

4. So far as the Lone Elm exchange is concerned the controversy is merely over the rate to be charged—the difference between ten and fifteen cents a message. Such a controversy has no real relation to the maintenance of the line in question. The fact that at present the business done by the defendant between Garnett and Lone Elm goes over the wire through Iola does not affect the matter. So long as the service is efficient—and this is not disputed—it makes no difference to the public whether the wire used follows an approximately straight line or not. The situation is much the same as though the defendant had built a new (and improved) line directly from Garnett to Lone Elm, and then destroyed the old one. There is no complaint of its facilities for handling all business between these points. If its present charge is unreasonable any grievance in that regard can be remedied as well without the reestablishment of the iron circuit as with it—the existence or nonexistence of an additional line does not affect the matter at all. The utilities commission is given a revisory power over any “practice or act whatsoever, relating to any service performed” by a public utility. (Gen. Stat. 1915, § 8343.) And as already stated, the statute forbids the change in any practice pertaining to service or rates without the commission’s consent. But the commission has no authority to control the action of a utility with respect to details or methods which do not affect the results produced—

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the service actually rendered—unless means are employed which are in themselves objectionable because detrimental to interests that are under the protection of the commission. If a telephone company substitutes a new wire for an old one, or a copper wire for a less serviceable iron one, that is not a change of practice pertaining to the service to which the commission can rightfully object. And the substitution of a longer line of communication for a shorter one is not objectionable unless the efficiency of the service is impaired or some incidental injury results.

These considerations require the refusal of the writ asked. To avoid a possible misunderstanding, it may be added that it does not follow from anything here decided that where by mutual arrangement a connection has been established between two or more local exchanges, by which their subscribers are brought into communication with each other without charge other than such as is included in the payment of rent, such service may be discontinued (or that an additional charge may be exacted for its continuance) without the consent of the utilities commission.

The application for a peremptory writ is denied.

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No. 21,586.

THE STATE OF KANSAS, *ex rel.* Herbert E. Ramsey, as County Attorney, etc., v. THE CITY OF HUTCHINSON et al., *Defendants*.

SYLLABUS BY THE COURT.

1. **QUO WARRANTO**—*Proper Proceeding to Determine Boundary of City.* The state may maintain quo warranto against a city for the purpose of determining its true boundary, where its fault consists in confining its territorial jurisdiction within too narrow limits, as well as where it undertakes to extend them too far.
2. **CITY ORDINANCE**—*Scope of Title—Boundaries of City.* By virtue of the statutory requirement that the subject of an ordinance (of a city of the first class) shall be clearly expressed in the title, the portion of an ordinance which undertakes to exclude territory from the corporate limits is held to be ineffective because the only purpose expressed in the title is "extending the limits of the city."
3. **BOUNDARIES OF CITY**—*Petition in Quo Warranto Construed.* A petition in quo warranto against a city, charging it with unlawfully re-

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fusing to exercise jurisdiction of a tract of land within the corporate limits, held to allege by fair implication that such tract has not been excluded from the city unless that result followed from the adoption of the ordinance referred to.

Original proceeding in quo warranto. Opinion filed January 12, 1918. Demurrer to petition overruled.

*Herbert E. Ramsey*, county attorney, *F. L. Martin*, and *E. T. Foote*, both of Hutchinson, for the plaintiff.

*Walter F. Jones*, and *J. S. Simmons*, both of Hutchinson, for the defendants.

The opinion of the court was delivered by

MASON, J.: The state brings an action in the nature of quo warranto against the city of Hutchinson for the purpose of determining whether a certain tract of land is within its corporate boundaries. Clay township, which adjoins the city at the place where the boundary is in dispute, is also made a defendant. The petition alleges that the land is within the city, but that the city, as well as the township, denies jurisdiction over it. The case is submitted upon the city's demurrer to the petition.

1. The city contends that quo warranto will not lie to correct its conduct in refusing to take jurisdiction of the tract in dispute, even if it be under a legal obligation to do so. Quo warranto is generally recognized as the proper method of seeking relief where a municipality undertakes to exercise control over disputed territory. (28 Cyc. 212; 23 A. & E. Encycl. of L., 2d ed., 638.) Here the situation is novel in that the city and township each seeks to impose upon the other the responsibility for the government of the doubtful territory. This attitude is accounted for by the fact that an accident has taken place upon a highway therein, which will doubtless result in claims for damages being made against whichever body is charged with the duty of maintaining it. A question as to the true boundary of a municipal corporation cannot ordinarily be raised by an individual (*Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417; *Horner v. City of Atchison*, 93 Kan. 557, 144 Pac. 1010), and an action by the state seems the appropriate means of settling a controversy in that regard. An essential part of

a municipality is the territory which it embraces. A city whose boundaries include a disputed tract cannot be precisely the same entity as one whose boundaries exclude it. "Every extension of corporate limits to include new territory is to that extent a reorganization" (*Topeka v. Dwyer*, *supra*, p. 247), and so a change of boundaries involves in a certain sense the creation of a new corporation. A special act undertaking to reduce the limits of a city has been held to be void because it is an attempt to confer corporate power, a result which can be accomplished only by a general law. (*Gray v. Crockett*, 30 Kan. 138, 145, 1 Pac. 50.) We conclude that an action by the state against a city to determine by what right it exercises corporate powers over a specified territory is a proper proceeding by which to determine the true boundary line, whether the alleged fault of the defendant lies in extending its territorial jurisdiction too far, or in confining it within too narrow limits.

2. According to the allegations of the petition, the tract in question is situated within the boundaries of the city as they were established up to 1890. On August 8, 1914, an ordinance was passed which was described in its title as one extending the city limits. It undertook to define by course and distance the new boundary line in the vicinity of the disputed tract. There was some repugnancy of calls at this place, but a part of the line described would necessarily lie inside of the boundary as it existed in 1890. The plaintiff contends, and the contention is clearly well founded, that inasmuch as the title of an ordinance is required to express its subject (Gen. Stat. 1915, § 1413), any part of this one which undertakes to reduce the territory of the city is rendered void by the fact that the title refers only to an extension and not to a restriction of the limits.

3. The city does not seem to controvert this proposition, but argues that in order to uphold the ordinance we should presume that prior to its adoption the boundaries as established in 1890 had been changed to conform to the line it describes. The petition does not say in so many words that no change of boundary was made between 1890 and the date of the ordinance, but we think it must be regarded as doing so by fair inference. It alleges that in 1890 the limits of the city were defined "as at present constituted," and that prior to August 8,

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1914, "no ordinance had ever been adopted" changing them. In the city's brief it is said that the territory could have been excluded by other means than the passage of an ordinance—that this could have been accomplished by "any one of several methods," which, however, are not pointed out. The statute provides for excluding tracts from cities by the action of the board of county commissioners (Gen. Stat. 1915, §§ 813, 814), but when this is done the change is required to be recorded by ordinance. (Gen. Stat. 1915, § 819.) An earlier statute provided for changes of boundary being made upon the order of the district court, but was held to be unconstitutional. (*Hutchinson v. Leimbach*, 68 Kan. 37, 74 Pac. 598.) An attempt to ratify acts done under it (Gen. Stat. 1915, § 820) seems open to objection as special legislation. But assuming that the territory might have been excluded from the city otherwise than by ordinance, the failure of the petition explicitly to deny that such action had taken place seems inadvertent rather than studied. We interpret the pleading as meaning that the tract in controversy has never been excluded from the city unless this result was accomplished by the adoption of the ordinance of 1914. No injustice can result to the city from this interpretation. If it claims that such change has actually been made it can readily plead the affirmative fact.

The demurrer to the petition is overruled, and the city is allowed thirty days from this date in which to file an answer, if it desires to do so, setting out specifically any proceedings upon which it relies as having effected the exclusion of the tract in question.

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No. 21,601.

*In re* CHARLES WRIGHT, Petitioner.

## SYLLABUS BY THE COURT.

**INTERURBAN RAILWAY—Local Service within City Limits—Control of Utilities Commission—Arrest under Void Ordinance—Habeas Corpus.** The Union Traction Company operates an interurban line some ninety miles in length from Nowata, Okla., into and through Coffeyville, Independence, Cherryvale and Parsons in this state, all under one management and from one power house. Over certain branch tracks in the city of Independence are operated four cars for local service, at least one of which is also operated over about three miles of its main track. The petitioner was arrested for violating a city ordinance requiring these local cars to run to a given point on the main-line track at specified times. *Held*, that the power to make this requirement rests exclusively with the public utilities commission.

Original proceeding in habeas corpus. Opinion filed January 12, 1918. Writ allowed.

*John J. Jones*, of Chanute, and *Chester Stevens*, of Independence, for the petitioner.

*Walter L. McVey*, of Independence, for the respondents.

The opinion of the court was delivered by

WEST, J.: The Union Traction Company operates an interurban car line from Nowata, Okla., into and through Coffeyville, Independence, Cherryvale and Parsons in this state, and a city line in the city of Independence and a city line in Coffeyville, all directed by the same officers. The local service in Independence covers 4.75 miles of branch tracks, and 3.3 miles of the main-line track, the local cars being four in number.

The petitioner was arrested for violating an ordinance of Independence requiring the company to operate these local cars to a certain place and at certain intervals, and claims that his restraint is unlawful because of the invalidity of such ordinance, his theory being that the public utilities commission and not the city has sole control over the operation of the traction company's cars. This is the only question in the case.

In 1906 the city of Independence passed ordinance No. 496, granting to the company—

"A franchise to construct, equip, maintain and operate an Interurban



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Electric Railway and Power Plant for manufacturing, furnishing and distributing light, heat and power, and for the transportation of passengers and the carrying of freight, mail and express within, through, over and along the streets and alleys and public places in the City of Independence, Kansas, and for operating such Interurban Railway and Power Plant and defining the duties, rights and privileges hereunder."

This ordinance required, among other things, that the tracks should be laid a certain way, of specified material; that the poles should be set in a manner therein indicated, and kept painted; and restrictions were made as to the hanging of the wires and the equipping of the railway; the city reserving the right "to reasonably regulate by ordinance the speed of cars within the limits of said city." The company was required within thirty days to file with the city clerk its acceptance in writing of the provisions of the ordinance, duly acknowledged, and to execute a bond in the sum of \$500 to secure the construction and completion of the road within the time named in the ordinance. In 1910 the city adopted a resolution reciting that the company had filed in writing its election to extend its line of interurban railway to or near certain industries near the city, and had asked the mayor and commissioners to agree with it as to what streets or portions thereof it might use on which to extend its line of interurban railway accordingly, and reciting a certain agreement as to this matter, and then proceeding to the effect that the company might use certain streets therein named for such purpose—

"over and across which to build, construct and extend its line of interurban railway, the same to be built, constructed and operated under and be subject to all the terms and conditions of ordinance No. 496."

The company operates its line, running through the cities mentioned, as a unit, the main office being at Coffeyville, Kan., and the power plant at Independence, which supplies the power for all the properties of the company. The Independence service here involved is entirely over the interurban line, with the same track, trolley poles, and power. The entire length of line, including sidings and switches and the like, is over 90 miles. The local cars do not make connections with the interurban cars. The bookkeeping of the interurban and local lines is done with the same books and as a part of the same system, but separate accounts are kept. The electrical

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engineer testified that in the operation no separate statement of his time is made touching the city service separate and apart from that of the interurban service. He was asked whether if the company should operate a car every thirty minutes from the power house in Independence to the city park that would interfere with the city service in Coffeyville, and he answered that the system is so arranged that if more load is had than can be carried the parts of it can be disconnected.

"In fact it will automatically be disconnected temporarily, and in that case the cars in one town might operate and the other cars might be operating under very weak power. Or in case of line trouble down this way every car in Coffeyville might be entirely stopped and the cars might be running at normal in Independence."

Section 1674 of the General Statutes of 1915 authorizes cities of the second class—

"to make all contracts, and do all other acts in relation to the property and affairs of the city necessary to the exercise of its corporate or administrative powers."

Cities are also empowered to enact all such ordinances, rules and regulations not inconsistent with the laws of the state as may be expedient for maintaining the peace, good government, and welfare of the city and its trade and commerce. (Gen. Stat. 1915, § 1704.)

Section 825 of the General Statutes of 1915 gives cities of the three classes power to issue bonds "for the purpose of purchasing, constructing or extending . . . heating or street-railway or telephone service."

Section 836 empowers all incorporated cities "into or through which any interurban railroad may have heretofore been built, or into, or through which any interurban railroad may propose to build a line of interurban railroad," to grant franchises "upon such terms and conditions as such city may by ordinance prescribe." This was enacted in 1915, and hence was not in force when the franchise in this case was granted, but is quoted from to indicate the present powers of the city.

Section 8330 defines "common carriers" to include all street railroads, suburban or interurban railroads, and all persons and associations of persons operating such agencies for public use in the conveyance of persons or property within this state.

Section 8368 (§ 40 of the utilities act) is as follows:

"The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state relating to common carriers and public utilities, and shall not repeal any other remedies or rights now existing in this state for the enforcement of the duties and obligations of public utilities and common carriers or the rights of the public utilities commission to regulate and control the same except where inconsistent with the provisions of this act."

Section 8369 (§ 41 of the utilities act) reads:

"The provisions of this act and all grants of power, authority and jurisdiction herein made to the commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the commissioners."

These are admonitions to give full practical effect both to the new law and to the old and to construe each liberally and impartially.

The provisions of the public utilities act indicate an intention to clothe the commission with general supervisory powers over the operation of an enterprise like that of the traction company.

Section 8329 (§ 3 of the utilities act) reads:

"The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to said public utilities commission as hereinafter provided in section 33 of this act."

Section 8361 (§ 33 of the utilities act) provides that—

"Every municipal council or commission shall have the power and authority, subject to any law in force at the time, to contract with any public utility or common carrier, situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, by ordinance or resolution, duly considered and regularly adopted: (1) As to the quality and character of each kind of product or service to be furnished or rendered by any public utility or common carrier, and the maximum rates and charges to be paid therefor to the public utility or common carrier furnishing such product or service within said municipality, and the terms and conditions, not inconsistent with this act or any law in force at the time under which such public utility or common carrier may be permitted to occupy the streets, highways or other public property within such municipality. (2) To require and permit any public utility or common carrier to make such additions or extensions to its physical plant as may be reasonable and necessary for

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the benefit of the public, and may designate the location and nature of such additions and extensions at the time within which such shall be completed, and the terms and conditions under which the same shall be constructed."

This section further provides that upon complaint being made that the ordinance or resolution of such city is unreasonable the public utilities commission shall act as a sort of appeal board, and unless its recommendations are followed may proceed in court in the name of the state to set aside such ordinance or resolution—

"because of its unreasonableness or illegality, or because the same is not for the promotion of the welfare and best interests of said municipality. . . ."

Other features of the legislative situation are well set forth by Mr. Justice Dawson in *Street Lighting Co. v. Utilities Commission*, 101 Kan. 774, 169 Pac. 205.

At a comparatively recent period it was bitterly complained that public service corporations controlled the municipalities, but the foregoing steps in the progress of legislation demonstrate that the state and its municipalities now control these corporations. The seemingly practical arrangement has been made by the legislature, in accordance with the doctrine of home rule, that local affairs shall be under the control of local officers, but that utilities which are not principally confined in their operations to a given municipality shall be under the supervision of the state commission, and, as indicated, in certain cases of local friction the state commission acts first in a sort of appellate capacity, and then next, if necessary, as advocate for the complainants by a proceeding in court. The property here directly involved is in a physical sense purely an interurban road. It is physically impossible to separate or divide the track itself into one for local and another for through purposes. There is no question that for all through purposes the property and its operation come within the exclusive jurisdiction of the state board. It is equally clear that these local cars must be operated so as not to impair, impede, or destroy the through service.

Let it be understood that nothing is intended or attempted to be decided now except the sole question as to whether the refusal of the traction company to comply with the ordinance

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is within the exclusive jurisdiction of the city commission or that of the public utilities commission. No question affecting the local branch lines is before us.

Giving to all the legislation involved the liberal construction expressly required, and following the familiar rule to give each portion thereof its intended meaning, the conclusion is reached, and the court holds, that the failure of the traction company to comply with the ordinance touching the times and place at and to which the cars in question shall be operated over the main-line track is one within the exclusive jurisdiction of the public utilities commission.

The petitioner having been convicted on the theory that the city commission was the one having sole jurisdiction, it follows that his retention is unlawful, and the writ is granted.

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No. 21,603.

THE FIRST NATIONAL BANK OF JUNCTION CITY, *Plaintiff*, v. RODGER MOON et al., as Officials of Geary County; SAMUEL T. HOWE et al., as Tax Commissioners of the State of Kansas et al., *Defendants*.

No. 21,218.

THE INTERSTATE MORTGAGE TRUST COMPANY, *Appellant*, v. FAIRFAX BARNES, as County Clerk, and NINA WOODFORD, as County Treasurer, etc., *Appellees*.

## SYLLABUS BY THE COURT.

1. TAXATION—*Banks and Loan and Investment Companies—Tax on Shares of Stock—Statute.* The tax contemplated by section 11236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and loan or investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation.
2. SAME—*Shares of Stock—Assessable at True Value.* Shares of stock are to be assessed at their true value, which may or may not coincide with their bookkeeping value.
3. SAME—*Proper Deductions from Value of Shares of Stock.* The assessed value of real estate generally, and not merely the banking house or office building, and real estate representing an investment of original capital stock, may be deducted from the value of shares of stock.

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4. *SAME—No Deductions for Real Estate Owned in Other States.* No deduction may be made for real estate in other states owned by state banks, national banks, or loan or investment companies.
5. *SAME—Limit of Deductions from Value of Shares of Stock.* In the case of state banks, the deduction on account of real estate necessary for the convenient transaction of business, including furniture and fixtures, may not exceed the value of the real estate which the bank has capacity to hold for that purpose.
6. *SAME.* The limitation stated in the preceding paragraph does not apply to national banks or loan or investment companies.
7. *SAME—Improper Deduction from Assessed Value of Shares of Stock.* No deduction from the assessed value of shares of stock of banks can be made on account of real estate acquired in the ordinary transaction of business, which is retained beyond the periods limited by the state and federal laws for holding such real estate.
8. *SAME—Classification of Banks with Loan and Investment Companies Reasonable.* The classification of loan or investment companies with state and national banks for purposes of taxation is a reasonable classification, which does not infringe the constitutional requirement that taxes shall be assessed and levied at a uniform and equal rate.
9. *SAME—Rule Prohibiting Deduction of Value of Real Estate in Foreign State—No Infringement of Constitution.* The prohibition upon deducting from the value of shares of stock of state banks and loan or investment companies the value of real estate situated in a foreign state does not infringe the fourteenth amendment to the constitution of the United States.
10. *SAME—Not Double Taxation.* The prohibition does not result in double taxation by this state.
11. *SAME—State Tax Commission—Assessments Properly Made.* Conduct of the state tax commission in arriving at the true value of shares of stock, not fraudulent or so arbitrary or capricious as to amount to fraud, is not subject to review by the courts.

Case No. 21,603. Original proceeding in mandamus. Opinion filed January 12, 1918. Writ allowed in part and denied in part.

*J. V. Humphrey*, and *Arthur S. Humphrey*, both of Junction City, for the plaintiff.

*S. M. Brewster*, attorney-general, *S. N. Hawkes*, *John L. Hunt*, assistants attorney-general, *W. E. Ziegler*, of Coffeyville, *W. N. Banks*, *O. L. O'Brien*, both of Independence, *Donald Muir*, of Anthony, *L. B. Morris*, of Junction City, *H. L. McCune*, *R. B. Caldwell*, and *Blatchford Downing*, all of Kansas City, Mo., for the defendants.

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Case No. 21,218. Appeal from Labette district court; ELMER C. CLARK, judge. Opinion filed January 12, 1918. Affirmed.

*E. L. Burton, George F. Burton, and W. A. Disch*, all of Parsons, for the appellant.

*C. E. Pile, and L. E. Goodrich*, both of Parsons, for the appellees.

The opinion of the court was delivered by

BURCH, J.: These actions involve controversies between state banks, national banks, and a loan company, on one side, and taxing officials on the other. The controversies relate to the assessment of shares of stock of the institutions named, and the deductions to be made from such assessments on account of investments in real estate in Kansas and other states. With the exception of some minor matters, the questions presented must be solved by an interpretation of the tax laws of the state, considered in connection with other laws, including statutes of the United States. The questions are of such character that they may be apprehended without a résumé of the pleadings. An abstract of the pertinent laws is appended to this opinion. For convenience in reference, numbers in brackets have been prefixed to each subdivision of section 11236 of the General Statutes of 1915 which relates to a distinct subject. This section will be designated, for brevity, the tax law.

The first question to be determined is: What is the precise subject of taxation reached by the tax law?

The first subdivision of the tax law provides that "stockholders" of state and national banks and of loan or investment companies shall be assessed and taxed "on the true value of their shares of stock." The second subdivision requires a return to be made, by a designated officer of the corporation, of "the amount and value of stock" held by each stockholder, together with "the value of any undivided profit or surplus." The third subdivision requires the corporation to pay the tax "assessed upon said stock and undivided profits or surplus," and gives the bank a "lien thereon," but reserves a remedy against the stockholder. The fourth subdivision authorizes a deduction on account of "capital stock" invested in real estate, to be

made "from the original assessment of the paid-up capital stock." The fifth subdivision provides that bank stock and investment or loan company "stock or capital" shall not be assessed at a higher rate than other property. The sixth subdivision makes the act applicable to certain mutual insurance companies. The seventh subdivision provides that the assets, moneys, and credits of mutual insurance companies shall be subject to assessment and taxation. The first five subdivisions refer to state banks, national banks, and loan companies. The sixth and seventh subdivisions refer to mutual insurance companies, and in what follows, the sixth and seventh subdivisions will be omitted from consideration, unless specifically mentioned.

It is not strange that this Joseph's coat piece of legislation should be confusing to taxing officers, especially those to whom the invisible, intangible entity called a corporation is still an enigma, and should be confusing to corporate officers and stockholders. It affords fine opportunity for legal dialectics and discursion. The fact is, the statute was the product of necessity, which limited the subject of taxation to shares of stock as the property of stockholders.

In the case of state banks, capital stock is the fund contributed by the stockholders to start the bank. It must not be less than a prescribed sum. It must be fully subscribed before a charter can be taken out, and the subscriptions must be paid in cash before a certificate authorizing the bank to engage in business can be obtained from the bank commissioner. The fund is divided into shares of one hundred dollars each. Each stockholder's subscription is of a certain number of shares, and certificates, called certificates of stock, are issued to stockholders to evidence ownership of their shares. The original fund, called capital stock, can neither be increased nor diminished, except under prescribed conditions and according to prescribed formalities. When paid in by the stockholders, the money belongs to the bank. On the books of the bank the cash account is debited, and the money is the property of the corporation, the same as if the corporation were a natural person. The bank is managed and controlled by a board of directors, and the stockholders have no voice in its business affairs.



When the corporation begins doing business it has no money or property except the cash paid in on subscriptions to capital stock. The corporation buys a banking house with some of the money. The banking house is not capital stock. It is simply property purchased with money of the bank. The corporation proceeds to do a general banking business, and acquires notes and other instruments representing loans, acquires bonds, stocks, mortgages and other securities, and acquires real estate and various other kinds of property. All this property belongs to the bank. The stockholders have no proprietorship in it or proprietary dominion over it. The property thus acquired, credits of various kinds, and cash and cash items in the vault, constitute the bank's assets or resources, sometimes spoken of in an economic way as its capital. They have all been acquired through the uses to which the original capital stock and its products have been put, but they are not capital stock. Capital stock is still and always the original fund subscribed by the stockholders at the inception of the organization, and stands as a liability on the books of the bank, instead of as an asset. The bank makes some money. Profits belong to the corporation, and can be disposed of by the board of directors only; not by the stockholders. The stockholders have no property in profits until the directors have declared a dividend. In order to create a fund to meet unforeseen contingencies and unusual losses, the bank does not distribute all the profits among the stockholders, but retains some of them. The fund so created is designated surplus. Profits not set aside as surplus or distributed in dividends are undivided profits. Surplus and undivided profits are the property of the bank. As the names indicate, they are not capital stock, but are something besides capital stock. After paying for the number of shares of capital stock which he has subscribed, the stockholder's right to claim money or property from the bank and its business is limited to sharing in such dividends as may be declared by the board of directors out of profits, and to sharing in the distribution of the assets of the bank when it winds up its affairs, after depositors and all other creditors have been satisfied. This right attaches to and is proportionate to the number of shares of capital stock which the stockholder owns. His shares are his personal property, and they may be bought and sold as other personal prop-

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erty, by the observance of certain formalities. They may be willed away, and in case of intestacy pass to his administrator as a part of his personal estate. He cannot sell or will away any part of the money or property which belongs to the corporation.

The foregoing explanation will serve quite as well for national banks and loan companies as for state banks. It is as simple and as elementary as it can be made, so much so that it seems extraneous to a judicial opinion. It may be helpful, however, to inexperienced assessors, county clerks, and county boards of equalization, and perhaps others. There are indications that the legislative mind was not perfectly clear on the subject.

The state was admitted into the Union before the national bank act was passed by congress. Article 11 of the state constitution was devoted to finance and taxation, and section 2 of that article provided that the property of a bank, its notes, bills discounted or purchased, moneys loaned, and all other property, effects, or dues of every description, without deduction, should be taxed. The first tax law was framed according to that theory. (Laws 1860, ch. 114, Compiled Laws 1862, ch. 197.) The exigencies of the civil war led to the creation of the national banking system. The purpose was to supply a market for government bonds and provide a safe and elastic system of national currency issued on the security of such bonds. Government bonds were not taxable, the national banks were federal agencies, exempt from taxation except so far as congress waived the exemption, and the first act, passed on February 25, 1863, contained no provision for state taxation. Such a provision was added by congress in 1864, and appears as section 5219 of the Revised Statutes of the United States. Concerning this act the supreme court of the United States has said (*italics employed for emphasis*) :

"This section, then, of the revised statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of *the shares of stock in the names of the shareholders* and to an assessment of *the real estate of the bank*. Any state tax therefore which is in excess of and not in conformity to these requirements is void." (*Owensboro National Bank v. Owensboro*, 173 U. S. 664, 669.)

The result of the congressional legislation was to prevent

application to national banks of state legislation taxing bank property other than real estate. In New York state banks were taxed on their capital. An act was passed taxing shares of national bank stock to the stockholders. The act did not, however, tax the shares of state banks to the stockholders. The act was held void because it discriminated in favor of stockholders of state banks, notwithstanding the fact that state banks were taxed on their capital. In the opinion the supreme court of the United States said:

"The banks of the state are taxed upon their capital; and although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which are exempt from state taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen v. Arnoud* [9 Adolphus & Ellis, New Series, 806]. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of congress has left subject to taxation by the states, under the limitations prescribed." (*Van Allen v. The Assessors*, 70 U. S. [3 Wall.] 573, 581, 583, 584.)

The result in Kansas was that the legislature was obliged to conform the bank-tax law to the federal law, in order to avoid taxing the state's own banks out of existence. They could not compete with national banks, if stockholders were

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taxed on the full value of their shares, and, in addition, the bank were taxed on all its property. Full equality between state and national banks was finally accomplished by the tax-law revision of 1876. (Laws 1876, ch. 34, § 22.) The law was given its present form by the inclusion of loan companies and certain mutual insurance companies in 1891. (Laws 1891, ch. 84, § 1.)

The distinction between the class of property owned by stockholders known as shares of stock, and the class of property owned by the corporation called capital stock, and sometimes called capital, has always been recognized and enforced by the supreme court of the United States. Its decisions are authoritative because of the legislative purpose to conform the tax law to the requirements of the federal law. A specious argument frequently advanced is that the shares of stock represent the capital stock, which in turn represents the property of the corporation, so that a tax return of shares by the stockholders, or the corporation for them, and a return of capital stock or property by the corporation, accomplish the same end, but by different methods. The fallacy of this argument is exposed by the decision in the case of *People v. The Commissioners*, 71 U. S. (4 Wall.) 244. The capital of a national bank consisted of \$100,000, which was all invested in United States securities, exempt from taxation. In assessing the shares of stock to stockholders the assessor valued them at par, and made no deduction on account of the exempt character of the securities in which the bank had invested all its capital. A stockholder contested the assessment. The assessment was sustained on the authority of the decision in the case of *Van Allen v. The Assessors*, supra. If the bank itself had been taxed the exemption would have been allowed.

In the case of *Bank of Commerce v. Tennessee*, 161 U. S. 134, the ownership of surplus was considered. The charter of a state bank provided for a tax on each share of capital stock, in lieu of all other taxes. A subsequent statute undertook to tax the bank's surplus. It was contended the statute violated the obligation of the contract expressed in the charter. In the opinion it was said:

"In *Tennessee v. Whitworth*, 117 U. S. 129, at page 136, Mr. Chief Justice Waite, in delivering the opinion of the court, says: 'That in cor-

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porations four elements of taxable value are sometimes found. First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders.'

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. . . . Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock, and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders." (*Bank of Commerce v. Tennessee*, 161 U. S. 134, 147.)

Considered in the light of its origin, and of its clear purpose to place state banks and loan companies on the same basis for taxation as national banks, the tax law becomes easy of interpretation, notwithstanding the loose phraseology employed. It would not be possible to levy a valid tax on the capital stock, the surplus, the undivided profits, or other property of a national bank, because of the restrictions contained in the federal law. Consequently an intention to tax property of that character to state banks or loan companies cannot be imputed to the legislature. Neither may stockholders be taxed on property which belongs to the bank and not to them, and the result is, the subject of taxation stated in the first subdivision of the tax law is, shares of stock belonging to stockholders.

The purpose of the list of stockholders required by the second subdivision of the tax law is obvious. The stockholders are the persons taxed; not the bank or loan company. The statement of the amount and value of stock held by each stockholder, together with the value of any undivided profits or surplus, is designed to facilitate the work of the taxing officers. The third subdivision makes the bank or loan company a responsible agent for the collection of the taxes due from the shareholders. The "tax assessed upon said stock and undivided profits or surplus," which the corporation is required to pay, is not any tax on stock, undivided profits, or surplus, because no such tax has been assessed. The tax is a tax on shares of stock, the personal property of the stockholders. The "lien

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thereon" given the corporation to reimburse it for payment of the tax is not a lien on stock, surplus, and undivided profits. The corporation already owns these in its own right. The lien is on the property of the shareholders—their shares of stock. This method of collecting taxes due from stockholders was discussed in the case of *National Bank v. Commonwealth*, 76 U. S. (9 Wall.) 353, where the court said:

"A very nice criticism of the proviso to the 41st section of the national bank act, which permits the states to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while congress intended to limit state taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the states the mode in which the tax should be collected. The mode under consideration is the one which congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper, in regard to the numerous wealthy corporations of those states. It is not to be readily inferred, therefore, that congress intended to prohibit this mode of collecting a tax which they expressly permitted the states to levy." (p. 363.)

The next question is: By what standard shall stockholders be assessed and taxed on their shares of stock?

The first subdivision of the tax law states the standard—"the true value." The president, cashier or managing officer of the corporation submits a list of the stockholders. Annexed to the names is a statement of the amount of stock, number of shares and value of the stock held by each. That accounts for the capital stock. A further statement is made of the amount carried to surplus and the amount of undivided profits, shown by the books of the bank. If capital stock should be \$100,000, surplus \$45,000, and undivided profits \$5,000, the book value of each share of \$100 would be \$150. That might or might not be the true value. There may be two banks on opposite sides of the same street, with the same capital stock and the same surplus. The true value of a share of the stock of one may be \$200, while the true value of a share of stock of the other may be less than par. The value of all tangible assets of

every kind, including the value of all real estate owned, should be considered. Intangible elements of value—rights, privileges, good will, capacity and opportunity to achieve financial success, results of past business and the outlook for the future—should be considered. In a word, the entire potentiality of the corporation to profit by the exercise of its corporate franchises should be taken into account.

The next question is: From what assessed value shall a deduction be made on account of investments in real estate?

The tax law says the deduction shall be "from the original assessment of the paid-up capital stock of said corporation." This is an impossibility. No assessment, original or otherwise, of the paid-up capital stock is provided for, and no such assessment is made. For the reasons stated above, the meaning is, the deduction is to be made from the total valuation of all the shares of stock belonging to all the stockholders. To ascertain the personal liability of an individual stockholder, the remainder should be divided by the whole number of shares, and the quotient multiplied by the number of shares which he owns.

The next question is: What deductions on account of investments in real estate may be made? This is a compound question.

The tax law specifies real estate held by fee-simple title. This means full and unconditional ownership in fact. Should real estate be taken in satisfaction of a debt, it would make no difference that title was taken, for convenience, in the name of some officer or employee of the corporation. If a deed should be given the corporation in payment of a debt, it would make no difference that the deed was withheld from record, and the debt carried on the books of the bank as an obligation of the debtor. The real estate would belong to the bank by title in fee simple, within the meaning of the law. Real estate deeded to the bank by warranty deed, but in fact for security only, would not be held by title in fee simple.

The bank act (sections 514 and 568 of the General Statutes of 1915, with their amendments) limits the value of the banking house, furniture and fixtures which a state bank may own to not more than one-third of its capital stock, now one-third of its capital stock and surplus. The purpose of the limitation was to put a stop to the expenditure of bank

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funds in the erection and extravagant furnishing of Grecian temples for the housing of state banks. The court is of the opinion the tax law should be construed in connection with this limitation on the capacity of state banks to hold real estate, and that no deduction should be made on account of banking house, furniture and fixtures in excess of the limited value. The federal statute (Revised Statutes, § 5137) contains no such limitation on the capacity of national banks, and the corporation law contains no such limitation on the capacity of loan companies. The disability imposed on state banks does not affect them, and they are at liberty to deduct the full value of real estate of the character under consideration.

The state and federal bank acts limit the length of time that real estate acquired in the ordinary transaction of business may be held. No deduction can be made on account of real estate held beyond the prescribed period. At the expiration of such period, real estate should have been either converted into assets which may not be deducted, or else charged off.

An ingenious argument is made to the effect that under the provisions of subdivision four of the tax law the value of no real estate may be deducted except that into which the original fund derived from payments of subscriptions to capital stock has gone. The argument assumes that the term capital stock was used by the legislature according to its true signification. It has already been shown that the same term used in the concluding portion of the same sentence cannot bear that signification. Since the term was not used with technical accuracy in one part of the sentence, it is not likely the strict meaning was intended in another part. (*Building Co. v. Saline County*, 98 Kan. 732, 734, 160 Pac. 971.) There are two general classes of property reached by taxation, personalty and real estate. These classes are recognized by the tax law. An essentially different system of procedure is employed in the assessment and collection of taxes on each. In valuing the personal property taxed to the stockholder, that is, his shares of stock, the value of all real estate, from whatever funds derived, would necessarily be included. Preferring to tax real estate as real estate, to its owner, the corporation, according to the appro-



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priate method of procedure, and not desiring to tax the same value twice, provision was made for deducting from the value of the personality the included value of real estate.

The People's State Bank of Coffeyville, joined as a defendant in case No. 21,603, but in fact interested on the side of the plaintiff, claims the right to a deduction on account of real estate not located in Kansas. The statute does not provide for such a deduction. The object of the law is to provide revenue to meet the needs of the state government. The command of the law is that real estate, the value of which is deducted from the value of stockholders' shares, "shall be assessed as other lands or lots." This can apply to no real estate except that subject to the tax laws of the state. If the value of real estate outside the state were to be deducted, shares of stock would be taxed at less than their true value, without opportunity to recoup the abatement by taxation of real estate. The value of real estate in another state, owned by a national bank, may not be deducted from the value of shares of stock, unless the deduction be permitted to state banks. In a case which arose in Utah it appeared that a deduction was allowed on account of real estate situated in that state, but not on account of real estate situated in other states. The supreme court of the United States, in disposing of the complaint of a national bank, said:

"While real estate of a bank situated outside of the state of domicile is taxed in the state of its situs, yet the value of such real estate necessarily enters into and is considered in estimating the value of the shares of stock, and to deduct the value of the real estate would, to the extent of such deduction, reduce the real value of the shares, without a compensatory equivalent. (*Commercial Bank v. Chambers*, 182 U. S. 556, 561.)

It is insisted that the state bank should be accorded the same privileges as those corporations which are embraced within the provisions of section 11164 of the General Statutes of 1915. Under that section capital stock is regarded as the equivalent of all the shares of capital stock issued and outstanding (*Building Co. v. Saline County*, 98 Kan. 732, 160 Pac. 971), and is valued just as shares of stock in banks are valued. Capital stock value is considered as representative of all value-producing elements attending the corporate enterprise. (*Gas Co. v. Spaeth*, 83 Kan. 191, 109 Pac. 785.) The value necessarily in-

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cludes real estate and chattels which, if the property of an individual, would be listed and taxed in the usual way. If, when the corporation lists its capital stock, it specifies particularly the real estate and the chattels which it owns, and returns such property for taxation in the usual way, the value of such property may be deducted from the value of capital stock, except that real-estate mortgages and chattel mortgages may not be deducted. If it be shown that real estate and personal property situated in another state have been duly listed for taxation there, such property may be deducted. The remainder is the value of the capital stock, for purposes of taxation. Stockholders are not taxed on their shares, and capital stock, valued in the manner described, is taxed as personal property to its owner, the corporation. It has already been shown that this method of taxation is not possible in the case of state banks, because of the necessity to conform the taxation of state banks to the taxation of national banks, and banks and loan or investment companies are expressly excluded from the operation of the section by the provision, "except such companies and corporations as are specially provided for by the statute."

The Interstate Mortgage Trust Company, the appellant in case No. 21,218, also claims the benefit of the privileges conferred by section 11164 of the General Statutes of 1915. The appeal is from an order of the district court of Labette county, in which the company has its principal office, sustaining a demurrer to its petition praying for an injunction against the enforcement of an order of the county board of equalization, which was approved by the tax commission. In its petition the company described itself as a loan company, so that it is embraced within the provision of the tax law placing state banks, national banks, and loan or investment companies in the same class. The provision of the state constitution, requiring a uniform and equal rate of assessment and taxation (Gen. Stat. 1915, § 228), does not forbid the employment of different methods of assessment and taxation for different classes of property. The method of assessing and collecting railroad taxes is radically different from the methods employed in assessing and collecting taxes on every other species of property in the state. (*Gulf Railroad Co. v. Morris*, 7 Kan. 210.)

Shares of stock in domestic corporations are taxed in one way, and shares of stock in foreign corporations in another. (*Hunt v. Allen County*, 82 Kan. 824, 109 Pac. 106.) In the opinion in the case last cited it was said:

"The inequality in this case grows out of the different method provided by the statute for listing and assessing shares in the two kinds of corporations. Of necessity the legislature has adopted several different methods for the assessment of property of different classes and used in different kinds of business. The same rate of taxation was levied upon the plaintiff's property, and the same method of assessment was applied thereto, as is applied to the property of all other citizens similarly situated. So far no Solon has appeared in this or any other state of the Union who could devise a method, or any number of methods, of assessment and taxation for all the various kinds of property which would result in equal taxation in every individual case. As has been said, if absolute equality of taxation is required, there can be no taxation." (p. 828.)

This being true, the claim under consideration reduces to this: Is the classification of loan companies with state and national banks a reasonable classification? The question is answered by the company's petition, in which it stated that its sole and exclusive business is that of making loans on real-estate securities, selling the same, issuing bonds and depositing real-estate securities as collateral therefor, and receiving moneys and securities on deposit for the purchase of real-estate mortgages. It is therefore purely a financial institution, dealing in money, obligations for the payment of money, and securities for such obligations, and as such is clearly in affinity with banks. Although not material to the decision, presumably the institution is within the jurisdiction of the banking department of the state, because of the use of the word "trust" as a part of its corporate name. (Gen. Stat. 1915, § 2403.)

— The loan company asserts that double taxation will result unless the value of its real estate situated in the state of Oklahoma be deducted from the value of its shares of stock. The assertion is predicated on a misconception of the tax law. It is said that the tax law provides for the assessment of the capital stock of banks and loan companies. It has been demonstrated above that the tax is not on capital stock, but on shares of stock in the hands of stockholders, and that the two

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classes of property are distinct in fact, and dissimilar for purposes of taxation. In the opinion in the case of *Bank of Commerce v. Tennessee*, 161 U. S. 134, it was said:

"The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. . . . This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one." (p. 146.)

It is said that taxation of the Oklahoma real estate and taxation of the shares is double taxation. The statute does not tax the Oklahoma real estate. The shares of stock are property of the individual stockholder, which the law requires shall be taxed at their true value. This value includes the value of whatever real estate the corporation owns, the situs of which is wholly immaterial. The loan company is in the situation of a Maryland corporation which desired to deduct the value of New Jersey real estate from the value of the shares of capital stock assessed and taxed to its stockholders. The court of appeals of Maryland disposed of the subject in an opinion which has received universal approval, and from which the following extracts are taken:

"The separate shares of the capital stock of the corporation are authorized to be issued by the charter derived from the state, and are subject to its control in respect to the right of taxation; and every person taking such shares, whether resident or nonresident of the state, must take them subject to such state power and jurisdiction over them. Hence the state may give the shares of stock, held by individual stockholders, a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon. (*State v. Mayhew*, 2 Gill, 487; *National Bank v. Commonwealth*, 9 Wall. 353.) And while it is true, that the shares of the capital stock of the corporation represent the capital stock, and everything of which the capital stock is composed, whether invested in real estate or other kind of property, the situs of the investment (other than the real estate of the company situated in this state), is wholly immaterial. . . . The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property, beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the state, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed

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for purposes of taxation. . . . Nor is there anything novel in the principle of such taxation." (*American Coal Co. v. County Comm'rs of Allegany County*, 59 Md. 185, 193, 194.)

The loan company misconceives the meaning and application of the expression, "double taxation." It is not double taxation to tax taxable property within the state once. Shares of stock are taxable property. Real estate in Kansas is taxable property. Real estate in Oklahoma is not taxable property, and is not taxed. Shares of the loan company's stock, reduced in value by the value of the Kansas real estate, are taxed, and the Kansas real estate is taxed. That covers the taxable property within the state just once, and covers nothing more.

"We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned." (*Kidd v. Alabama*, 188 U. S. 730, 732.)

If the value of the untaxed Oklahoma property were deducted from the value of the shares of stock, a portion of this state's taxable property would escape taxation. Besides this, in this instance all taxable value not derived from tangible property would be wiped out. The loan company listed its capital stock, surplus, and undivided profits at par, \$135,015.42. From this sum it deducted the value of its real estate in Kansas, \$48,980, and claimed the right to deduct, to the extent necessary to cancel capital stock, surplus, and undivided profits, the value of its Oklahoma real estate, \$206,882. With all its faults, the tax law is not so paradoxical.

Because the property taxed by the state of Kansas and the property taxed by the state of Oklahoma are of different kinds and belong to different owners, there is no double taxation, in the invidious sense. It is true that taxes on the corporate property in Oklahoma must be paid from funds which constitute a potential source of dividends to stockholders, and in that sense such taxes are an indirect burden on the stockholders. The burden, however, is not imposed by the laws of the state of Kansas, and is an incidental consequence of the voluntary election of the corporate managers to extend the business of the company beyond the jurisdiction of the state. This

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corporation derives its life and all its capacities and powers, including its capacity to employ capital stock, from the state of Kansas. Its shares of stock are valuable personal property, having a lawful situs within the borders of the state, and there is no more occasion for the state to forego taxes on such property than there is for the state of Oklahoma to forego taxes on property situated within its borders.

The loan company argues that if the tax law does not permit deduction of the Oklahoma real estate, it infringes the fourteenth amendment to the constitution of the United States. The argument is predicated on the decision of the supreme court of the United States in the case of *Delaware, L. & C. R. R. Co. v. Pennsylvania*, 198 U. S. 341. The state of Pennsylvania taxed corporations on the value of their capital stock, and the question was whether or not the value of coal, having its situs in another state, could be included in the taxable value of the capital stock of a Pennsylvania corporation. It was held that the value of the coal should be excluded. The supreme court of Pennsylvania recognizes the distinction between property in shares of stock owned by stockholders and property in capital stock owned by the corporation and representing its assets, but declares the legislature of Pennsylvania has made no such distinction. Before the case arose, the supreme court of Pennsylvania had held that a tax on the value of capital stock is simply a tax on the property of the corporation. Some of the decisions to that effect are cited in the opinion of the supreme court of the United States, and there are many others. The supreme court of the United States was bound by the interpretation which the state court had given the state law, and the question was simply one of situs. The tax being a tax laid directly on property, it could not lawfully extend to tangible property outside the jurisdiction of the taxing state. The supreme court of the United States took care to guard its decision from misapplication to cases of the kind presented by the loan company's appeal, by inserting the following discriminatory observation in its opinion:

"Of course, the distinction between the capital stock of a corporation, and the shares into which it may be divided and held by individual shareholders, is borne in mind and recognized, and nothing herein affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the cor-

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poration itself which issues it, and has nothing to do with the individual shareholder. *Van Allen v. Assessors*, 3 Wall. 573; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 146." (*Delaware, L. & C. R. R. Co. v. Pennsylvania*, 198 U. S. 341, 354.)

The legislature of this state has recognized the distinction here made. The tax law was framed to comply with the decision in the *Van Allen* case and others of like character, and the tax is not a tax levied against the corporation on account of property which it owns.

Questions are presented by the Dearing State Bank and the Citizens National Bank of Independence with reference to the course pursued in arriving at the sums on which their shares of stock should be taxed. No fraud, or conduct so arbitrary or capricious as to amount to fraud, is made to appear, and the result of the conduct criticized may not be disturbed.

In case No. 21,603 the writ is allowed in part and denied in part. Issuance of the writ will be withheld. In case No. 21,218 the judgment of the district court is affirmed.

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ABSTRACT OF LAWS.

Sections 1 and 2 of article 11 of the state constitution (Gen. Stat. 1915, §§ 228, 229) read as follows:

"§ 1. The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family, shall be exempted from taxation.

"§ 2. The legislature shall provide for taxing the notes and bills discounted or purchased, moneys loaned, and other property, effects, or dues of every description (without deduction), of all banks now existing, or hereafter to be created, and of all bankers; so that all property employed in banking shall always bear a burden of taxation equal to that imposed upon the property of individuals."

Section 11149 of the General Statutes of 1915 reads as follows:

"That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act."

Section 11236 of the General Statutes of 1915 reads as follows:

"[1]. Stockholders in banks and banking associations and loan and in-

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vestment companies organized under the laws of this state or the United States shall be assessed and taxed on the true value of their shares of stock in the city or township where such banks, banking associations, loan or investment companies are located;

"[2] and the president, cashier or other managing officer thereof shall under oath return to the assessor on demand a list of the names of the stockholders and amount and value of stock held by each, together with the value of any undivided profit or surplus;

"[3] and said banks, banking associations, loan or investment companies shall pay the tax assessed upon said stock and undivided profits or surplus, and shall have a lien thereon until the same is satisfied: *Provided*, That if from any causes the taxes levied upon the stock of any banking association, loan or investment company shall not be paid by said corporation, the property of the individual stockholders shall be held liable therefor:

"[4] *Provided further*, That if any portion of the capital stock of any bank or banking association or loan or investment company shall be invested in real estate and said corporation shall hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots:

"[5] *And provided further*, That banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property:

"[6] *And provided further*, That the provisions of this act shall apply to all mutual and life insurance companies or associations having assets, accumulations, money or credits, and doing business under the laws of this state:

"[7] *And provided further*, That such assets, money and credits held and under the control of such mutual fire and life insurance companies or associations shall be subject to assessment and taxation."

Section 514 of the General Statutes of 1915 reads as follows:

"Any five or more persons may organize themselves into a banking corporation, and shall be permitted to carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefor; and of buying and selling exchange, gold, silver, foreign coin, bullion, uncurrent money, bonds of the United States and of the state of Kansas, and bonds and warrants of cities, counties, and school districts in the state of Kansas; of loaning money on real estate, chattel and personal security, at a rate of interest not to exceed the legal rate allowed by law; of discounting negotiable notes and of notes not negotiable, and to own a suitable building, furniture and fixtures for the transaction of its business, of the value not to exceed one-third of the capital of such bank: *Provided*, That nothing in this section shall prohibit such bank from holding and disposing of such real estate as it may acquire through the collection of debts due to it."



This section was amended by chapter 79 of the Laws of 1917, in particulars not material here.

Section 568 of the General Statutes of 1915 reads as follows:

"Any bank may purchase, hold and convey real estate for the following purposes, but no other: First, such as shall be necessary for the convenient transaction of its business, including its furniture and fixtures, but which shall not exceed one-third of the paid-in capital; second, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its business; third, such as it shall purchase at sale under judgment, decrees or mortgage foreclosure under securities held by it; but a bank shall not bid, at any such sale, a larger amount than to satisfy its debt and costs. Real estate shall be conveyed under the corporate seal of the bank and the hand of its president or vice president, and cashier or treasurer. No real estate acquired in the cases contemplated in the second and third subsection above shall be held for a longer time than five years. If not sold before the expiration of said five years, it must be sold at private or public sale within thirty days thereafter, or charged off out of the earnings or surplus of said bank."

By chapter 76 of the Laws of 1917 the first subdivision of this section was amended to read:

"First, such as shall be necessary for the convenient transaction of its business, including its furniture and fixtures, but which shall not exceed one-third of the paid-in capital and surplus."

Section 569 of the General Statutes of 1915, which went into effect March 11, 1897, reads as follows:

"Any bank now doing business in this state which owns real estate in excess of fifty per cent of its capital shall reduce its holdings by converting same into cash or other good assets, to an amount not exceeding fifty per cent of its paid-up capital, within one year after the passage of this act."

Section 11164 of the General Statutes of 1915 reads as follows:

"That no person shall be required to include in the list of personal property any portion of the capital stock of any company or corporation which is required to be listed by such company or corporation; but all incorporated companies, except such companies and corporations as are specially provided for by statute, shall be required to list by their designated agent in the township or state [city] where the principal office of said company is kept, the full amount of stock paid in and remaining as capital stock, at its true value in money, and such stock shall be taxed as other personal property; provided, that such amount of stock of such companies as may be invested in real or personal property which, at the time of listing said capital stock, shall be particularly specified and given to the assessors for taxation, shall be deducted from the

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amount of said capital stock; provided, that mortgages owned by any such company on property, real or personal, in any other state, shall not be deducted; provided further, that real or personal property in any other state, or county in this state, shall be deducted if it be made to appear that the same has been duly listed for taxation in such other state or county in this state."

Section 5219 of the Revised Statutes of the United States reads as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

Section 5137 of the Revised Statutes of the United States reads as follows:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

No. 21,623.

THE MID-WEST PHOTO PLAY CORPORATION, *Appellee*, v. MRS. J. M. MILLER et al., as the Kansas State Board of Review, *Appellants*.

## SYLLABUS BY THE COURT.

1. **MOVING-PICTURE FILMS**—*Decision of Board of Review—Review by the Courts.* Under the act relating to motion-picture films (chapter 308 of the Laws of 1917) the Kansas state board of review is given full power and discretion to determine whether films and reels offered for its examination and decision are moral and proper for exhibition, and its determination is conclusive and not open to review or interference by the courts unless its action is fraudulent, arbitrary, or in excess of its authority.
2. **SAME**—*Censorship by Board of Review—Redress of Aggrieved Party.* The redress for an aggrieved party provided for in section 15 of the act is not a reëxamination of the picture by the court nor the exercise of an administrative and nonjudicial power, but is such redress as a court may give.
3. **SAME**—*Petition to Court for Review—No Cause of Action Stated.* In the absence of allegations or proof that the board acted arbitrarily or dishonestly, it must be presumed that it acted in good faith and that its determination was an honest exercise of its best judgment.

Appeal from Wyandotte district court, division No. 3; WILLIAM H. MCCAMISH, judge; FRANK D. HUTCHINGS, associate judge. Opinion filed January 12, 1918. Reversed.

*S. M. Brewster*, attorney-general, *S. N. Hawkes*, and *John L. Hunt*, assistants attorney-general, for the appellants.

*Maurice McNeill*, of Columbus, *Edwin A. Krauthoff*, *W. S. McClintock*, and *A. L. Quant*, all of Kansas City Mo., for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This appeal involves the construction of section 15 of chapter 308 of the Laws of 1917, one of the provisions of the motion picture censorship law. It is as follows:

"The office of the board provided for in this act shall be in Kansas City, Kansas, and any person, company or corporation aggrieved by the action thereof, may have redress in the district court of Wyandotte county in this state, in which service may be had upon the board or any

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member thereof by commencing proceedings therein within sixty days from the action of the board complained of by such person, company or corporation; provided, however, that the beginning or pending of any such proceedings shall not abate or suspend the action of the board until the final disposition of such proceedings by the court."

The plaintiff, The Mid-West Photo Play Corporation, filed its petition in the district court of Wyandotte county alleging that it, as the owner of a certain motion picture film entitled "The Easiest Way," had submitted it to the defendants as the Kansas state board of review, and that, although the film was highly moral and proper, and no part of it was cruel, obscene, indecent, or immoral, or such as would tend to debase or corrupt public morals, the board rejected it and refused to allow its exhibition in the state of Kansas, on the ground that it was immoral, according to section 6 of the act. The petition contained no allegation that the members of the board acted arbitrarily or in bad faith. A general demurrer to the petition was filed, and this appeal is taken from the court's order overruling the demurrer.

It is said by plaintiff that as the averments of the petition are to be taken as true upon the demurrer, the allegation that the picture, "The Easiest Way," is highly moral and proper stands admitted, and that the plaintiff, if aggrieved, was entitled to an appeal to the district court. The statute, as will be observed, does not purport to give an appeal from the decision of the board or to authorize the court to reëxamine the picture and give its decision on its merits. The legislature authorized the creation of the board and vested in it the discretion and power of determining the character and fitness of pictures for exhibition in the state, commanding the board to approve those which are moral and proper, and reject those which are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals. (§ 6.) Under the old act it was provided that if the state superintendent of public instruction disapproved of a picture the party offering the same might have it examined by a commission consisting of the governor, attorney-general, and secretary of state, and if they, or a majority of them, should find it to be fit for exhibition the superintendent was required to indorse his approval on it. (Gen. Stat. 1915, § 10778.) Under that provision the review-

ing officers were authorized to examine the film on the same basis as the superintendent had done and to exercise their own judgment and discretion in determining the fitness of the picture for exhibition. If in their judgment it was fit, their decision and approval was substituted for that of the superintendent. However, that provision was expressly repealed, and, instead of an appeal or review by other executive officers, it was provided that if a party felt aggrieved at a disapproval of a picture by the board redress may be had in the district court of the county where the office of the board was located. What is the redress provided? Manifestly, it is such redress as a court can give, and not an exercise of executive or administrative power. A reëxamination of the picture to determine whether it was moral and fit for exhibition would be an exercise of administrative power, and that discretion and power was specially conferred upon the board. It would result in the substitution of the judgment of the court for that of the board in a pure matter of administration, which the legislature could not and evidently did not intend to confer upon the district court. It is fundamental that courts cannot be required or permitted to exercise any power or function except those of a judicial nature. (*Auditor of State v. A. T. & S. F. Railroad Co.*, 6 Kan. 500.) An aggrieved party may call on the court for judicial redress and not for the performance of a nonjudicial or administrative function. If the board abuses its authority and acts arbitrarily or fraudulently, redress from the courts may be had, and this was the redress provided for in the section in question. In *Symms v. Graves*, 65 Kan. 628, 70 Pac. 591, where the court was asked to review the action of the board of equalization in fixing the valuation of property for the purposes of taxation, it was said:

"Matters of assessment and taxation are administrative in their character and not judicial, and an interference by judges, who are not elected for that purpose, with the discharge of their duties by those officers who are invested with the sole authority to make and estimate value is unwarranted by the law. The district court could not substitute its judgment for that of the board of equalization, and this court cannot impose its notion of value on either. . . . But fraud, corruption and conduct so oppressive, arbitrary or capricious as to amount to fraud, will vitiate any official act, and courts have power to relieve against all consequential injuries. In every case, however, the departure from duty must be shown

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by the party seeking redress to fall within the well-defined limits of the powers of a court of equity." (p. 636.)

So, here, the duty and discretion placed in the board of review being administrative in character and nonjudicial, the court is not warranted in substituting its judgment for that of the board. If the board should act fraudulently, or so arbitrarily and capriciously as to amount to fraud, a resort to the courts may be had, and as against such action an aggrieved party may have redress. (*Silven v. Osage County*, 76 Kan. 687, 92 Pac. 604.) In *The State, ex rel., v. Mohler*, 98 Kan. 465, 158 Pac. 408, cited by plaintiff, this doctrine was recognized, and speaking of the acts of administrative boards it was said:

"The exercise of such power is merely the exercise of administrative discretion. If this power is abused, the courts are open to the aggrieved party, if not by some statutory review, then by the extraordinary and prerogative remedies of injunction or mandamus." (p. 472.)

There have been repeated holdings that the decisions of a board or other tribunal upon which the legislature has conferred the exercise of nonjudicial power, if made in good faith, are not open to judicial control or review, and that in such a case a court may go no farther than to prevent the abuse of the power so vested. In respect to the powers conferred on a municipal body it has been said that "the courts have no supervisory power over the policy of municipal legislation. They can only interfere to curb action which is *ultra vires* because of some constitutional impediment or lack of antecedent legislative authority, or because the action is so arbitrary, capricious, unreasonable and subversive of private right as to indicate a clear abuse rather than a *bona fide* exercise of power." (*City of Emporia v. Railway Co.*, 88 Kan. 611, 614, 129 Pac. 161; see, also, *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247; *Dever v. Humphrey*, 68 Kan. 759, 75 Pac. 1037; *Allen v. Burrow*, 69 Kan. 812, 77 Pac. 555; *Salt Co. v. Hutchinson*, 72 Kan. 99, 82 Pac. 721; *Richardson v. Simpson*, 88 Kan. 684, 129 Pac. 1128; *Board of Education v. Shepherd*, 90 Kan. 628, 135 Pac. 605; *Parrick v. School District*, 100 Kan. 569, 164 Pac. 1172; *Fairchild v. City of Holton*, 101 Kan. 330, 166 Pac. 503.)

The mandate of the constitution requiring the separation of

the powers of government has been consistently enforced, and the line or division between the departments has been fully considered and stated in some of the cases cited, and in *The State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, and *The State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606.

While the plaintiff alleged that the picture offered was moral and proper, it also averred that the board examined the picture and found it to be immoral. There is no averment in the petition or claim that the board acted arbitrarily, capriciously or fraudulently, or in excess of its powers. On such a pleading it must be assumed that the decision was made in good faith. The plaintiff states its conclusion to be that the picture is moral and proper, and then, in effect, alleges that the board mistakenly but honestly determined that it was immoral and unfit for exhibition. Fraud and dishonesty cannot be imputed to public officials unless plainly alleged and proven. We must presume that the board acted in good faith and that the decision that the picture is immoral was an honest exercise of the best judgment of its members. On this interpretation the demurrer should have been sustained.

The judgment is reversed and the cause remanded with directions to enter judgment sustaining the demurrer to the plaintiff's petition.

MASON, J. (concurring specially): I agree that the statute does not undertake to impose upon the court the duty of determining for itself whether a film passed upon by the board of review is moral and proper, or whether it is cruel, obscene, indecent or immoral. But I dissent from the statement (which appears to me to be dictum) that the legislature has no power to impose such a duty on a court. The members of the board of review are not given an option to accept or reject films at their pleasure. They have no discretion in the matter, except as that term may be used in the sense of implying the exercise of their judgment in determining the character of the film examined. If they decide that it is cruel, obscene, indecent or immoral, or that it tends to debase or corrupt morals, they must reject it; otherwise they must accept it. Whether it has any of these qualities is a question of fact which the legislature may commit to the final determination of an adminis-

trative tribunal, or of a court. An appeal may be authorized from a nonjudicial body to a court, where the matter to be passed on is one proper to be determined by a court in some other form of procedure. (12 C. J. 877.) The practice is well established of having an administrative tribunal pass upon conflicting claims, subject to an appeal to a court which shall finally determine some question of fact that is involved in the ruling made. (*Callen v. Junction City*, 43 Kan. 627, 23 Pac. 652; *Nash v. Glen Elder*, 74 Kan. 756, 88 Pac. 62; *Fong Yue Ting v. United States*, 149 U. S. 698.) Indeed the question has often been raised whether a determination by an administrative body of a question of fact affecting property rights is due process of law, unless an appeal to a judicial tribunal is provided—a question sometimes decided in the negative (12 C. J. 1241), but usually in the affirmative. (4 Dec. Dig., "Constitutional Law," § 313.) The question whether a particular film is immoral is doubtless one that can with advantage be finally committed to the judgment of an administrative body, but it does not seem to me to be so clearly nonjudicial that it may not be submitted to the determination of a court, if the legislature thinks that course advisable. Courts are frequently called upon to decide whether particular publications are obscene, the test being whether they tend to deprave and corrupt morals (29 Cyc. 1319), and I see no reason why they might not be required to decide similar questions with regard to films. I do not think a statute making it a misdemeanor to exhibit films which are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals, and authorizing the granting of injunctions against their exhibition, would be nonenforceable because of any inability of the courts to decide whether a particular film fell within the prohibition.

PORTER, J., joins in the special concurrence.



No. 21,698.

THE BOARD OF EDUCATION OF THE CITY OF WICHITA, *Plaintiff*,  
v. L. W. CLAPP, as Mayor of the City of Wichita, *Defendant*.

## SYLLABUS BY THE COURT.

**MANDAMUS—Election—School Bonds—Statute Repealed.** Section 9081 of the General Statutes of 1915 has been repealed by chapter 268 of the Laws of 1917.

Original proceeding in mandamus. Opinion filed January 12, 1918. Writ denied.

*S. B. Amidon, D. M. Dale, and S. A. Buckland*, all of Wichita, for the plaintiff.

*Robert C. Foulston*, of Wichita, for the respondent.

The opinion of the court was delivered by

MARSHALL, J.: By mandamus, the plaintiff seeks to compel the defendant to issue a proclamation calling a special election in the city of Wichita to vote bonds in the sum of \$150,000 for the purpose of purchasing schoolhouse sites and of erecting school buildings thereon. The board of education of the city proceeded under section 9081 of the General Statutes of 1915, and now seeks to compel the defendant, as mayor of the city, to call a special election under this section for the purpose of voting the bonds. The defendant refuses to call the election, and urges, as his reason for so refusing, that the board of education does not have authority to issue such bonds, for the reason that section 9081 of the General Statutes of 1915 was repealed by chapter 268 of the Laws of 1917. The defendant does not give any other reason or excuse for not issuing his proclamation calling an election. Section 9081 of the General Statutes of 1915 reads:

"It shall be the duty of the mayor of such city of the first class, within thirty days after receiving a certified copy of the action of the board of education, showing a necessity and giving a statement of the estimated cost of such school sites, repairs, additions, building or buildings, signed by the clerk and countersigned by the president of the board, to issue a proclamation for holding an election to vote bonds to the amount prayed for by the board; and no bonds shall be issued unless a majority of the

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qualified electors of the city school district voting at such election shall vote therefor; nor shall the entire amount of such school bonds issued exceed, in the aggregate, including existing indebtedness, *one per cent* of the value of the taxable property of such city as ascertained by the last assessment for state and county purposes previous to incurring the proposed indebtedness. Any member of a board of education, or officer thereof, who shall vote for, counsel, consent to, or in any wise assist in the issue of any bond or bonds in excess of the per centum herein authorized, shall be liable jointly and severally to the holder of any such bonds for the amount due thereon, to be recovered in a civil action in any court of competent jurisdiction; and judgment rendered thereon may be collected and enforced in the same manner as other judgments are collected and enforced: *Provided*, That in cities of the first class having more than 70,000 population, school bonds may be issued to the extent of not more than one and five-tenths per cent of such value of taxable property."

That section was amended by changing the italicized words "one per cent" so as to read "two and one-half per cent," and by changing the proviso at the end of the section so as to read, "*Provided*, This act shall not apply to cities having a population of 53,000 or more, and having an assessed valuation of \$65,000,000." This shows the change made in the law, but a clear presentation of the situation cannot be made without fully setting out chapter 268 of the Laws of 1917. This chapter, together with its title, is as follows:

"An Act relating to the issuing of bonds by boards of education in cities of the first class, limiting the amount of bonds which may be issued by said boards, amending section 9081 of the General Statutes of Kansas for 1915, and repealing said original section 9081.

*"Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That section 9081 of the General Statutes of Kansas for 1915 is hereby amended so as to read as follows: Section 9081. That it shall be the duty of the mayor of such city of the first class within thirty days after receiving a certified copy of the action of the board of education, showing a necessity and giving a statement of the estimated cost of such school sites, repairs, additions, building or buildings, signed by the clerk and countersigned by the president of the board, to issue a proclamation for holding an election to vote bonds to the amount prayed for by the board; and no bonds shall be issued unless a majority of the qualified electors of the city school district voting at such election shall vote therefor; nor shall the entire amount of such school bonds issued exceed in the aggregate, including existing indebtedness, two and one-half per cent of the valuation of taxable property of such city as ascertained by the last assessment for state and county purposes previous to incurring the proposed indebtedness. Any member of a board of education, or officer thereof, who shall vote for, counsel, consent to or in any wise assist in the issue of any bond or bonds in excess of the per centum

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herein authorized shall be liable jointly and severally to the holder of any such bonds for the amount due thereon, to be recovered in a civil action in any court of competent jurisdiction; and judgments thereon may be collected and enforced in the same manner as other judgments are collected and enforced: *Provided*, This act shall not apply to cities having a population of 53,000 or more, and having an assessed valuation of \$65,000,000.

"SEC. 2. That section 9081 of the General Statutes of Kansas for 1915 is repealed.

"SEC. 3. That this act shall take effect and be in force from and after its publication in the official state paper."

[Published in official state paper March 10, 1917.]

The plaintiff argues that the legislature did not intend to deprive the cities of the first class described in the proviso of section 1 of the act, of the power to vote bonds for school purposes. The plaintiff says:

"The courts have held that an absolute repeal will be qualified by reason of a purpose manifested in the repealing statute as to the subject matter not covered by the repealing statute."

The plaintiff cites a number of authorities which appear to sustain the principle contended for, but, when we examine the title of chapter 268 of the Laws of 1917 and see that the title includes a repeal of section 9081 of the General Statutes of 1915, and when we examine section 2 of chapter 268 and see that it expressly repeals section 9081, the court is driven to the conclusion that the legislature intended to repeal that section. To hold otherwise would be to say that the legislature did not do what it said it did do, and did not do what it said in the title of the act it intended to do.

The legislative history of the act may be of some assistance. The bill was introduced in the house as house bill No. 374. The only amendments then proposed to section 9081 were made by changing the amount of bonds authorized from one per cent to two and one-half per cent of the valuation and by striking out the proviso at the end of the section. The bill passed the house in that form. The Senate Journal for 1917, page 546, recites:

"Senator Getty moved to amend house bill No. 374 by adding at the end of section 1 the following: 'provided, this act shall not apply to cities having a population of 53,000 or more and an assessed valuation of \$65,000,000 or more.' The motion prevailed."

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The bill passed the senate as thus amended, was sent back to the house, and was passed by the house in the amended form.

If the bill as it passed the house had become a law, it would have applied to all cities of the first class. The bill as it finally passed, with the senate amendment, became a law and applies to all cities of the first class, except those described in the amendment.

When the legislature, in the title to an act, says that the act does repeal a certain statute, and then, by a specifically repealing section in the act, positively states that it does repeal that statute, the courts are bound to conclude that the legislature did what it intended to do.

Section 9081 of the General Statutes of 1915 has been repealed, and bonds for school purposes cannot be issued under it by boards of education in cities having more than 53,000 population and more than \$65,000,000 valuation.

The writ of mandamus is denied.

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No. 20,885.

THE DELAWARE STATE BANK, *Appellee*, v. WOODLIEF G. COLTON and THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Appellants*.

## SYLLABUS BY THE COURT.

1. INDEMNITY BOND—*Against Fraud of Bank Cashier—Loss—Bond Construed—Proof Required.* A surety bond indemnifying a bank against loss occasioned by the fraud or dishonesty of its cashier "amounting to embezzlement or larceny" is construed as intended to indemnify the bank from loss occasioned by the official's fraud or dishonesty of the general character and nature usually involved therein and in an action on the bond the plaintiff may recover without technical proof of fraudulent acts as required in criminal prosecutions for embezzlement or larceny.
2. SAME—"Immediate Notice" of Loss Not Given—Waiver. On the facts stated in the opinion, the failure of the plaintiff to give "immediate notice" of the loss, as provided in the bond, was waived by the conduct of the surety company in placing its denial of liability upon other distinct grounds.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed February 9, 1918. Affirmed.

*S. H. Piper*, of Independence, for the appellants.

*T. H. Stanford*, and *G. T. Stanford*, both of Independence, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The bank brought this action on a bond given by Colton, its former cashier, and the guaranty company as surety, to recover for loss sustained by reason of the fraud and dishonesty of Colton. The trial was by the court, resulting in findings that Colton had appropriated to his own use certain rents from property belonging to the bank, and had taken from its securities a note signed by his mother for \$800, by which the bank sustained loss; and that his acts were of such a fraudulent and dishonest nature as amounted to embezzlement. The bank was given judgment for the loss sustained in these transactions, and defendants appeal.

By the terms of the bond the surety company agreed to reimburse the bank for all pecuniary loss sustained by reason of the fraud or dishonesty of Colton in connection with the duties of his office "amounting to embezzlement or larceny," and the main contention urged is, that the demurrers to the petition should have been sustained on the ground that the petition failed to allege that the cashier's acts amounted to embezzlement or larceny. The bank's location was in Oklahoma, and it is urged that the petition should have pleaded the laws of that state defining these offenses.

It was not necessary that the petition should allege, or that the proof should establish, facts sufficient to constitute the crime of embezzlement or larceny. The purpose of the bond was to indemnify the bank against pecuniary loss occasioned through the fraud or dishonesty of Colton in connection with his duties as cashier, and the words "amounting to embezzlement or larceny" cannot be given the effect contended for. They do not so far qualify the words "fraud and dishonesty" as to relieve the surety company from liability until the bank produced testimony which would have been sufficient in a criminal case to convict Colton of one of these crimes. Bonds

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of this character are to be construed most strongly against the surety company. It is not in the position of a private surety, who is favored by the law and permitted to rely upon technical defenses. (*Hull v. Bonding Co.*, 86 Kan. 342, 120 Pac. 544; *Lumber Co. v. Douglas*, 89 Kan. 308, 321, 131 Pac. 563; *School District v. McCurley*, 92 Kan. 53, 142 Pac. 1077, and cases cited.) The surety company prepares the bonds on its own forms, and the courts as a general rule construe them as intended to protect the obligee from loss occasioned by the dishonest and fraudulent acts of the principal, wholly regardless of whether or not the principal might upon the facts established have been convicted of embezzlement or larceny. In *Champion Ice Mfg. & Cold Storage Co. v. Amer. Bond. & Trust Co.*, 115 Ky. 863, a case arising on a bond worded substantially as the bond in the present case, the same defense was urged. It was said in the opinion:

"Such a narrow construction of the provisions of the contract is not required by the law, and was never contemplated by the parties to it. While larceny is a common-law crime, yet in this state the punishment therefor is statutory. Embezzlement is purely a statutory crime, but the terms 'larceny' and 'embezzlement,' in the bond or policy sued on, are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employe to pay over to his employer, or account to him for, any money, securities or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employe. It will be observed that the bond in this case is a printed one—prepared, doubtless, by a skilled attorney in appellee's employ. The contract expressed therein is but a form of insurance, and the law of insurance is that, in the construction of policies, if there be any ambiguity in them, it must be construed most strongly against the insurance company." (p. 872.)

To the same effect is *City Trust, etc., Co. v. Lee*, 204 Ill. 69. In Frost's Law of Guaranty Insurance, 2d ed., the author says:

"To summarize briefly what has preceded, it may be asserted with confidence that the term 'embezzlement,' as used in fidelity insurance, does not call for the same technical proof of fraudulent acts on the part of the 'risk' amounting to the crime of embezzlement as would be required were the latter being prosecuted under the statute for the commission of such crime." (p. 117, § 43.)

In *McIntyre v. Surety Co.*, 97 Kan. 629, 156 Pac. 690, the conditions of the bond were somewhat broader than in the case at bar. The surety company agreed to pay the shortage of the

bonded party if his liability "is caused by robbery, fraud, defalcation, breach of trust or other intentional offense against the property of his employer, or which the latter may have entrusted to him, either as agent, employee or attorney." (Syl. ¶ 1.) It was held that recovery could be had upon proof that the default of the bonded party was caused by fraud or by a breach of trust, and that it was not necessary to show that he had embezzled the money or property entrusted to him.

The plaintiff introduced in evidence the statutes of Oklahoma defining the offenses of embezzlement and larceny, but this was unnecessary. It furnished no assistance to the trial court in determining whether or not the cashier's conduct constituted a breach of the bond. Since the trial was by the court, the defendants could not have been prejudiced by the evidence. Without regard to the statutory definition of these offenses, the facts established by the evidence justified the conclusion of law that the cashier's conduct amounted to embezzlement within the meaning of that term as used in the bond. To hold otherwise would defeat the purpose for which the bond was given and the premiums accepted by the surety company. We think the term "embezzlement" as used in the bond has a generic, and not a specific, meaning. The purpose was to indemnify the bank from loss occasioned by the official's fraud or dishonesty of the general character and nature usually involved in embezzlement or larceny. This accords with our previous decisions in the cases we have cited, holding such contracts mere forms of insurance, and, applying to them the law of insurance, construing all ambiguities in their terms most strongly against the insurer.

Colton testified that in a conversation with Mr. Guernsey, one of the officers of the bank, he was authorized to withdraw the note, charge it off, and return it to the maker, and it is urged that the findings in respect to this transaction are contrary to the evidence; that while Colton may have been mistaken as to the extent of his authority, he acted under a claim of right and was not, therefore, guilty of any fraud or dishonesty. He was a defendant and his declaration must be regarded as self-serving; besides, Mr. Guernsey was a witness and denied that any such conversation took place. Manifestly, the court believed Mr. Guernsey's testimony.

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It is contended that plaintiff cannot recover because of its failure to give "immediate notice" of the loss, as provided in the bond. The loss was discovered on the 15th of May. On the 21st of July the company was notified, and the court finds that the bank gave notice as soon as practicable. The findings are to the effect that the surety company made no complaint that it was not promptly notified. It responded to the notice and caused the books of the bank to be examined, and made inquiries of the defendant Colton. There is no showing that it was prejudiced in any way by the failure to give notice earlier. Moreover, the court finds that after the surety company had made its investigation it advised the plaintiff that inasmuch as Colton denied liability the surety company would not admit that it was liable. Having placed its denial of liability upon one distinct ground, with no complaint in respect to notice, it was too late after being sued for it to mend its hold and rely as a defense upon the failure to comply strictly with the condition respecting notice.

The judgment is affirmed.

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No. 20,887.

THE FIRST NATIONAL BANK OF HAYS CITY, *Appellant*, v. A. P. STAAB and JACOB P. STAAB, *Appellees*.

## SYLLABUS BY THE COURT.

1. REPLEVIN—*Chattel Mortgage—Pleadings*. An instruction covering fraud and mutual mistake, not pleaded, held improper.
2. PROMISSORY NOTE—*Variance by Parol*. Rule followed that the terms of a plain promissory note cannot be varied by parol.
3. REPLEVIN—*Value of Property—Replevin Affidavit Competent Evidence*. The affidavit in replevin made by the plaintiff was properly permitted to go to the jury on the question of value of the property involved.
4. SAME—*Mortgagee "Deeming Itself Insecure"—Conclusive*. Proof of a feeling of insecurity was sufficient to support the plaintiff's allegation that it deemed itself insecure, the reasonableness of such feeling being immaterial.

Appeal from Ellis district court; JACOB C. RUPPENTHAL, judge. Opinion filed February 9, 1918. Reversed.



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*C. M. Holmquist, A. D. Gilkeson*, both of Hays, *Lee Monroe, James A. McClure*, and *C. M. Monroe*, all of Topeka, for the appellant.

*E. A. Rea*, and *J. P. Shutts*, both of Hays, for the appellees.

The opinion of the court was delivered by

WEST, J.: The plaintiff bank loaned Jacob Staab \$175.25, taking his note payable on demand, which note his father was to have signed, but did not, secured by a chattel mortgage on some wheat and other property already mortgaged to the bank by the defendants to secure indebtedness which had been running and accumulating for a number of years. The bank brought replevin, and in its affidavit fixed the value of the wheat at \$3,000 and the other property at \$1,730. No redelivery bond was given. The bank sold the wheat for \$600 and the other property for \$971.50. The defendants pleaded an oral agreement on the part of plaintiff's cashier when the note of Jacob Staab was given, that no action would be taken on the chattel mortgage until the wheat was thrashed and marketed, and prayed judgment for a return of the property or the sum of \$4,500 and costs. The defendants recovered a judgment for \$3,900, and the plaintiff appeals, assigning as errors the admission of evidence as to the alleged agreement and certain other rulings touching evidence and instructions.

The principal complaint is that the alleged parol agreement contradicted the terms of the note given by Jacob Staab. The latter testified that when he gave this demand note he thought it was the same as any other and would "give a man time, thirty days or ninety days." That he understood from the cashier from what he said that he was to pay after the wheat was thrashed and marketed, and that he would not have signed these notes and chattel mortgage if he had known that the bank would demand payment within thirty days and before the wheat was thrashed and marketed. On cross-examination he testified that the note was not to be paid until after harvest.

"Q. Who told you that? A. Mr. Madden.

"Q. What did he say? Give us his exact language. A. Now, he says, I want you to straighten out these notes this fall. I says I will just as soon as I thresh. I says I can't pay them before that.

"Q. And that is what he said? A. Yes.

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"Q. He didn't say he would not try to collect them before that, he had any particular time? A. No, he never said that."

The court instructed that—

"Evidence has been presented as to the agreement regarding the maturity of the note given by Jacob P. Staab and of the alleged extension of his father's note until threshing or marketing time. . . . If, at the time that the defendant, Jacob P. Staab, signed the notes in controversy, he and the bank made an agreement to the effect that payment thereon was not to be made nor demanded until after the wheat of the defendant was threshed and marketed, and if it was understood and agreed at such time between said defendant and the bank that said notes should not mature nor be due and payable until after threshing and marketing the wheat, such agreement, if any, would be binding upon the plaintiff as well as the defendant, even though the note taken provided that it was due and payable 'on demand,' provided that by reason either of accident or mutual mistake of both parties, or of fraud on the part of the bank, the note did not express the contract or agreement of the parties in relation to the maturity of said note."

We are compelled to hold that this instruction not only went beyond the allegations of the answer, which did not allege any fraud or mutual mistake, and the evidence, which in no wise indicated either, but also went counter to the rule that the plain terms of a promissory note cannot be varied by oral testimony. This rule is clearly set forth in *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43, and *Bank v. Paper Co.*, 98 Kan. 350, 158 Pac. 44. It is but fair, however, to say that both of these decisions were rendered after the trial of this action.

It is complained that the affidavit was permitted to go to the jury on the question of the value of the property. The court refused an instruction that it should not be considered, and charged that, while not an absolute test of the value and while made only for the purpose of fairly approximating the value in fixing the amount of bond to be given, it might be considered so far as it threw light upon the question of a feeling of insecurity. There was no error in this of which the plaintiff can complain, for the court might have gone further and charged that the affidavit might be considered touching the question of value and the plaintiff's estimate thereof. (*Crawford v. Furlong*, 21 Kan. 698; *Hoisington v. Armstrong*, 22 Kan. 110; *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521; 34 Cyc. 1605.)

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On the question as to whether the bank actually deemed itself insecure, the jury were correctly charged that if when the property was taken the cashier took possession with the conviction of insecurity in his mind, that was sufficient. The cashier not only testified to this feeling of insecurity but gave cogent reasons therefor. It is complained that there was no evidence to the contrary, and that the jury were erroneously permitted to pass on the question. The court instructed that as the cashier had testified that he had such feeling at the time—

“Then upon the facts of the case if you think it is at all fairly and reasonably possible to believe that he had such feeling, then you should so find, and it should be held that the bank had a right to take possession of the property.”

There is nothing on the face of the record to impugn his credibility in the slightest, except the matter of value fixed in the affidavit, but this particular part of the charge is not complained of.

One of the provisions of the mortgage was that possession might be taken if the bank should deem itself insecure. It was alleged that it did so deem itself. The answer contained a general denial. It was proper, therefore, to permit proof as to such alleged feeling of insecurity—the reasonableness thereof being entirely immaterial.

The judgment is reversed, and the cause remanded for further proceedings.

No. 20,911.

ISADORE SMITH, *Appellant*, v. GEORGE HERN, *Appellee*.

## SYLLABUS BY THE COURT.

1. **FALSE ARREST—Pleadings—Damages—Necessary Allegations.** In an action to recover damages for false arrest, where the petition alleges that by reason of the false arrest the plaintiff's business greatly declined and was damaged in the sum of \$1,000, it is not reversible error to require the plaintiff to set out in his petition specifically and in detail how he was thus damaged.
2. **SAME—Officer May Arrest Without a Warrant.** An officer may arrest a person without a warrant where the officer has reasonable grounds to believe that a felony has been committed by the person arrested.
3. **FALSE ARREST—Receiving Stolen Goods—Evidence of Other Similar Offenses.** In an action to recover damages for false arrest, where the defendant seeks to justify the arrest by proving that the plaintiff had knowingly received feloniously stolen goods, evidence is admissible to prove that the plaintiff had on other occasions knowingly committed a similar offense.

Appeal from Reno district court; FRANK F. PRIGG, judge.  
Opinion filed February 9, 1918. Affirmed.

*Carr W. Taylor*, and *F. Dumont Smith*, both of Hutchinson,  
for the appellant.

*F. L. Martin*, *Van M. Martin*, and *John M. Martin*, all of  
Hutchinson, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff commenced this action to recover damages for false arrest. A jury returned a verdict in favor of the defendant, judgment was rendered in his favor, and the plaintiff appeals.

1. The plaintiff's original petition was attacked by a motion asking the court to require the plaintiff to amend the petition in a number of particulars. That motion was allowed in part and denied in part. An amended petition was then filed; that petition was attacked by another motion, which was allowed in part and denied in part. A second amended petition was then filed; that petition was attacked in a similar manner,

and that attack was sustained in part and denied in part. A third amended petition was filed, and that petition was attacked in like manner, but the motion was denied. Complaint is made of the manner in which the plaintiff's several petitions were treated on the hearing of the motions, but no specific error is pointed out on which to attack any order made by the court on the hearing of any of the motions.

The plaintiff's original petition contained the following:

"Plaintiff further states that by reason of said willful, wanton, malicious, oppressive and unlawful conduct of the defendant he has been publicly disgraced, defamed and humiliated and greatly injured in his business, reputation and standing in this community, and that by reason thereof as above alleged, he has been damaged in the sum of \$5,000.00 general damages, and \$3,000.00 exemplary damages, in the aggregate the sum of \$8,000.00."

The plaintiff was required to amend that petition by setting out the amount claimed for injury to business and the amount claimed for injury to reputation and standing in the community. In the first amended petition, the allegation above referred to appeared as follows:

"As a result thereof this plaintiff was damaged in his business in the sum of \$1,000. That by reason of said false arrest, this plaintiff was greatly humiliated and put to shame, to his damage in the sum of \$5,000. That as a result of the said arrest and the publicity thereof, which necessarily followed, this plaintiff was damaged in his reputation in the sum of \$2,500."

The plaintiff was again required to amend his petition by setting up the facts and details showing how he was damaged in his business in the sum of \$1,000. In the second amended petition, that allegation appeared as follows:

"As a result thereof the business of this plaintiff greatly declined and he was damaged in his business in the sum of \$1,000.00. That by reason of said false arrest, this plaintiff was greatly humiliated and put to shame, to his damage in the sum of \$5,000.00. That as a result of the said arrest and the publicity thereof, which necessarily followed, this plaintiff was damaged in his reputation in the sum of \$2,500.00."

The plaintiff was required to amend his second amended petition by setting out specifically and in detail how he was damaged in his business in the sum of \$1,000. This order of the court was not complied with. If the damage to the plaintiff's business, as alleged in the second amended petition, was capable of proof, if there was any evidence to prove such dam-

age, the facts and details showing how the plaintiff was thus damaged could have been shown. The court did not order that the allegation concerning damage to business be stricken from the petition. That allegation was voluntarily omitted from the third amended petition. It was not prejudicially erroneous to require the plaintiff to state in detail how he was damaged in his business.

Other than as stated, the plaintiff's cause of action appears to have been fully stated in his third amended petition. Some of the other orders made by the court on the motions may have been erroneous, but it does not appear that they were prejudicially so. It does not appear that any fact was not alleged that should have been alleged by the plaintiff in order to state his cause of action.

2. The defendant was chief of police of the city of Hutchinson. In his answer, he set up a general denial, which constituted a denial of the arrest, and he set up justification for the arrest; that justification was that the defendant had reasonable grounds for believing that the plaintiff had recently received feloniously stolen goods, knowing that the goods had been so stolen, and that the plaintiff was guilty as an accessory after the fact, and that it was the intention of the defendant to have the plaintiff brought to trial upon these charges.

The plaintiff quotes the following language from *Prell v. McDonald*, 7 Kan. 426:

"When the acts of officers in arresting and imprisoning a person are void, they are liable to the party injured, although they may have acted in entire good faith. When an officer acts without authority, or exceeds his authority, he is liable, whether he acts maliciously or not." (Syl. ¶ 9.)

The language quoted does not sustain the position of the plaintiff unless the acts of the defendant were void. According to *Prell v. McDonald*, those acts were not necessarily void. In that case the court said:

"It must be presumed from the evidence that the plaintiff committed the offense with which he was charged, which was a breach of the peace by fighting; and it must be presumed that the defendant Files made the arrest on sufficient information. In such a case he would not at common law be liable." (p. 446.)

An officer may arrest without a warrant where he has reasonable grounds to believe that a felony has been committed by the person arrested. (*Garnier v. Squires*, 62 Kan. 321, 325,

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62 Pac. 1005; *Railway Co. v. Hinsdell*, 76 Kan. 74, 76, 90 Pac. 800; 2 R. C. L. 450; 5 C. J. 399.)

There was evidence which tended to show that the plaintiff was not arrested. If that evidence was believed by the jury, a defense sufficient to defeat the plaintiff's action was established. There was also evidence which tended to show sufficient facts to justify the defendant in arresting the plaintiff without a warrant, and in holding him on the charge of either having knowingly received stolen goods, or of being an accessory thereto after the fact. That evidence, if believed by the jury, likewise constituted a sufficient defense to the plaintiff's action. Those defenses were submitted to the jury under proper instructions, and the jury rendered a general verdict in favor of the defendant. That verdict may have been properly based on the evidence that there was no arrest, or on the evidence that the defendant had knowledge of facts sufficient to justify him in arresting the plaintiff.

3. At the time of the transaction complained of in this action, the plaintiff was a junk dealer in the city of Hutchinson, and he had been engaged in that business for some years. On the trial, the defendant introduced evidence which tended to show that the plaintiff had on other occasions knowingly received stolen property. The plaintiff says:

"The most grievous error that we complain of was the admission of evidence of other alleged offenses at times preceding the arrest."

The plaintiff's contention is against the weight of authority. A clear statement of the rule concerning the introduction of evidence of other similar offenses on a charge of having received stolen goods is found in 2 Wharton's Criminal Evidence, 10th ed., page 1660, as follows:

"A very great latitude is allowed in the reception of evidence relating to the possession of stolen goods. Thus, evidence that there were other instances of the reception by the defendant of stolen goods is relevant; that the accused had received such goods from the same person; that he bought them at an inadequate price; that he received them at unusual hours of the night; and other unusual or suspicious circumstances attending the possession."

This rule is supported by a number of authorities, although in some of them it is stated that generally it must be shown that the goods were received from the same person, but this qualification is not found in all the authorities. (24 A. & E.

Encycl. of L., 2d ed., 53; 1 Wigmore on Evidence, § 324; 4 Chamberlayne on Modern Law of Evidence, § 3225; 10 Ency. of Ev., p. 673, subdiv. D; 34 Cyc. 525.)

In a note on "Evidence of other crimes in criminal case," under a subdivision "Receiving stolen property," 62 L. R. A. 193, 269, this language is found:

"Receiving stolen property knowing it to be stolen is a crime in which, as its name implies, the guilty knowledge of the theft must be established to justify a conviction. It is for this reason that, on a trial for this offense, evidence of a former receipt by the accused of goods under circumstances showing knowledge of their having been stolen is competent and admissible, though it establishes, or tends to establish, a distinct crime."

The general rule is, that the evidence is admissible if it tends directly to prove the defendant guilty of the crime charged, although it may also tend to prove a distinct felony, and thus prejudice the accused. (*The State v. Folwell*, 14 Kan. 105; *The State v. Adams*, 20 Kan. 311, 319; *The State v. Burns*, 35 Kan. 387, 389, 11 Pac. 151; *The State v. Reed*, 53 Kan. 767, 774, 37 Pac. 174; *The State v. Stevens*, 56 Kan. 720, 722, 44 Pac. 992; *The State v. Kirby*, 62 Kan. 436, 444, 63 Pac. 752; *The State v. Franklin*, 69 Kan. 798, 799, 77 Pac. 588; *The State v. Hansford*, 81 Kan. 300, 301, 106 Pac. 738.)

In a prosecution for forgery, this court said:

"For the purpose of proving that the accused had knowledge of the false character of the instrument which he is charged with uttering and passing, it is competent to show that at about the time of the offense he possessed or uttered other similar forged instruments." (*The State v. Calhoun*, 75 Kan. 259, syl. ¶ 4, 88 Pac. 1079.)

(See, also, *The State v. Chance*, 82 Kan. 388, 391, 108 Pac. 791.)

These are the rules in criminal prosecutions. The present action is not a criminal prosecution; it is a civil action for damages. The defendant was undertaking to justify his action in causing the arrest of the plaintiff—if the plaintiff had been arrested. By the evidence complained of, the defendant was seeking to establish the fact that the plaintiff had on prior occasions knowingly received stolen goods. The defendant sought to establish that fact for the purpose of showing that he had information sufficient to justify him in arresting the plaintiff. It was not necessary for the defend-



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ant to introduce evidence sufficient to establish the plaintiff's guilt; it was only necessary for the defendant to introduce evidence sufficient to show that he was justified in arresting the plaintiff. There was no error in admitting that evidence.

Other matters are presented by the plaintiff; they have been examined, but have been found insufficient to warrant a reversal of the judgment.

The judgment is affirmed.

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No. 21,045.

HALLIE COOPER, *Appellee*, v. J. A. COOPER and CYNTHIA COOPER, *Appellants*.

SYLLABUS BY THE COURT.

1. **ALIENATION OF AFFECTIONS—*Duty of Parents towards Son's Wife.*** The parents of a nineteen-year old son owe no legal duty towards that son's wife, except not to meddle intentionally with their son's affections for his wife.
2. **SAME—*Insufficient Evidence against Mother-in-law.*** A mother-in-law is not guilty of alienating her infant son's affections for his wife merely because she disliked the wife and regretted her son's marriage, and expressed her belief that because of his extreme youth he was not fitted for the responsibilities and duties of a married man.
3. **SAME—*Insufficient Evidence against Father-in-law.*** A father-in-law is not guilty of alienating his infant son's affections for his wife merely because he gives his son financial assistance to attend school after the wife has refused to live with the son on account of his inability to support her, and when in good faith the father sought to improve his son's earning capacity by improving his education.
4. **SAME—*Judgment Not Sustained by Evidence.*** Evidence examined and held insufficient to sustain a judgment in favor of plaintiff against her parents-in-law for the alienation of her husband's affections.

Appeal from Allen district court; OSCAR FOUST, judge. Opinion filed February 9, 1918. Reversed.

*R. E. Cullison, Frank R. Forrest, and B. E. Clifford*, all of Iola, for the appellants.

*F. J. Oyler*, of Iola, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff recovered a judgment for damages against her father-in-law and mother-in-law for alienating her husband's affections.

On March 10, 1914, the plaintiff, a girl of twenty, married the defendants' son, a youth who was about a month under nineteen years of age. The young husband had no means of supporting his bride, so he brought her to the home of his parents, with whom they resided for some weeks. About May 1, 1914, the defendants permitted plaintiff and her husband to take up their abode on defendants' farm and to use their furniture. Early in June the plaintiff and her husband went on a month's visit to Illinois, and on their return they stayed a week on the farm, and then they moved into furnished rooms in Moran, where they resided until November 12, 1914, when the plaintiff went to Illinois to attend her invalid grandmother. Plaintiff gave birth to a child in Illinois and remained there many months. During her long absence in Illinois she and her husband had become estranged; and he, with some financial aid from his father, had entered school at Emporia. Plaintiff returned to Moran in October, 1915, and on demand of plaintiff the defendant Cooper recalled his son from school, but the young people never resumed relations as husband and wife. Plaintiff caused her husband's arrest for nonsupport, but he was discharged by the examining magistrate. Then she instituted a suit against him for alimony, and commenced this action against the defendants. Issues were joined and the cause was tried to a jury, which gave a verdict for plaintiff for \$5,000 against both defendants. Several unimportant questions were answered by the jury, and also the following:

"Q. 4. Before the estrangement of plaintiff and Beryl Cooper, did the defendant, J. A. Cooper, have or exhibit any malice against the plaintiff?

"A. Yes.

"Q. 7. Did the defendant, J. A. Cooper, intentionally and maliciously speak any word or perform any act for the purpose of alienating the affections of his son from the plaintiff?

"A. Yes.

"Q. 8. If you answer the foregoing in the affirmative, state what he did or said. (Stricken out by court.)"

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A long assignment of errors is presented, the chief of which is that there was no evidence upon which to base the verdict of the jury. To aid the court in testing the correctness of this contention, we have an abstract of 160 pages by appellant and a counter-abstract of 92 pages by the appellee. Both of these bulky compilations have been studied with care. Both are cumbered with an interminable mass of more or less irrelevant matter, designed apparently to show what the defendants did and did not do towards establishing the young people in housekeeping and in business; and what the defendants did and failed to do to show their affection for plaintiff and her baby, which was the offspring of this marriage, and defendants' grandchild. There is also in the record a plethora of letters from plaintiff to her husband while she was in Illinois. The first of these was affectionate in tone, but her later letters were filled with faultfinding, with exasperation at the young husband's failure to pay his bills, his failure to launch himself in some sort of paying business which would enable him to support his wife and child; and between occasional terms of endearment she called him a cad, a calf and a jackass, etc. The letters contained also an occasional allusion to her husband's mother, whom she conceived to be the cause of her young husband's lack of enterprise. The trial court admonished counsel for both parties that much of this correspondence was inadmissible under ordinary rules of evidence, but it all went in by consent or waiver of counsel. (21 Cyc. 1625.)

The law does not require anything whatever from the hands of parents-in-law, except that they do not meddle with the domestic felicity and affections of their son and his wife. The parents may hold aloof, decline to recognize the wife, show no interest in her or her children, or cut off their son without a penny for marrying without their approval. Wise parents-in-law, of course, do none of these things. They usually consider the daughter-in-law an accession to their family, take her into their hearts and affections, and re-live the joys of their own youth in the marital happiness of their children; and when grandchildren come there is commonly a continuous and delightful contest between the youthful parents and the grandparents for first place in the affections of the grandchildren. That is the way it ought to be. Happy the grandparents who

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view the matter in that light! But if they fail to do so, they are not to be penalized in damages, unless they are guilty of some intentional acts which tend to alienate their son's affection for his wife.

To support an action against parents-in-law for alienating their son's affections for his wife a much stronger and clearer case is required to be established than against a stranger. (*Powers v. Sumblar*, 83 Kan. 1, 5, 110 Pac. 97; *Multer v. Knibbs*, 193 Mass. 556, 9 L. R. A., n. s., 322, and note; *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 575; *Beisel v. Gerlach*, 221 Pa. St. 232, 18 L. R. A., n. s., 516; 13 R. C. L. 1471-1475.)

As to Mrs. Cooper, senior, there was no substantial evidence that she meddled with the domestic felicity of her son and daughter-in-law. True, she admonished them against showing an excess of their affections before third parties who might talk about them or laugh at them, and there was some evidence that she disliked the plaintiff. But her relations with her daughter-in-law were very limited. She went visiting in western Kansas and in Colorado for most of the summer and autumn, and, consequently, saw little of her son and plaintiff during the time they lived together. Doubtless Mrs. Cooper, senior, greatly regretted her son's marriage, because of his extreme youth and immature fitness for marital responsibilities, but what mother would do otherwise? All the evidence tends to show that the general conduct of Mr. Cooper, senior, towards plaintiff was kindly, discreet, and tactful. Disregarding the evidence in his behalf and which tended to show that he was disposed to help make the plaintiff's and his son's marriage a success (for the jury might disbelieve that evidence), all that appellee can show is that during plaintiff's prolonged and voluntary absence in Illinois he advanced money to his son to go to school, and that because of his presence at some interviews which he arranged between her and his son on her return from Illinois she was prevented from making a private effort at reconciliation with the latter. Since the son was admittedly incapable of making a satisfactory living for her, and the plaintiff had a good home in Illinois and had avowed her intention to remain there until he could do so, there was certainly nothing wrong in the defendant father

assisting his son to a further education which might bring the result she desired.

As to the presence of Cooper, senior, at the interviews between plaintiff and her husband, those interviews were brought about by the defendant. It was never hinted that he should withdraw and leave the young couple to talk privately. They were disposed to quarrel, and defendant Cooper was trying to make peace and harmony between them. Plaintiff intimated very pointedly that she desired no private conference with her husband. She told him point blank that he would need to produce a doctor's certificate before she would resume marital relations with him.

On January 12, 1915, plaintiff wrote to her husband:

"Beryl I am in a mighty good home and I am as welcome as I ever was before I married you and I intend to stay right where I am until you wake up and prove yourself man enough to support me. . . . Now you take that money you were going to use to come here and look up a job. Every other young fellow around there can make a decent living for his wife and if I were you I would hate to be the only cad. Of course they have to work and it is no disgrace and you are no better than the rest and a boy that has the health and strength that you have ought to be ashamed of himself if he was too indolent to try and help himself. . . . You can gallivant around and smoke your cigars and act the part of a dude but when it comes to earning you take a lay off. . . .

"Now when you can prove to me you are capable of supporting me and my child I am ready to take up my part but I will not suffer the child to be brought up in poverty as long as I can help it. I will work for it rather than deprive it of the advantages of life. I never had to and never will as long as I stay with my father. Now Beryl I hope you will look at this as I have written now don't wait and depend on your people any longer move for yourself."

On February 28, 1915, she wrote:

"You know I always prefer the farm when things are half way respectable but under conditions that you hold never. Perhaps if you read your scriptures you will find where it says something like this when a man shall take unto himself a wife he shall leave his own people and cleave unto her, if you persist in staying there I will say no more you are stubborn about it so I will stay just where I am. . . . You have had your own way since we have been married and now I will have mine for a while. . . . What a snob and sore head you were and how mean you were with me when you brought me home this summer and I paid my own fare at that yet you think I ought to be willing to live on the doorstep with your people. No, never. You should have married a girl from common stock not Tom Peckham's daughter."

Early in May, 1915, the defendant father-in-law wrote to plaintiff urging her to return to her husband. She replied on May 11, 1915, in part, as follows:

"I fully realize Mr. Cooper that it is hard for a parent to realize the errors of their children but surely you do not think that Beryl has played the fair game with me do you.

"You have asked me to be frank with you otherwise I would not have complained.

"He has informed me that he will not stay on the farm neither will he try to do anything else yet he thinks I should return to Moran. If he is not willing to furnish support what inducement would it be for me to return.

"When Beryl is willing to act the part of a man and husband to me I am willing to do my part but until then I will stay with my father. . . .

"Now I am very sorry that this has caused you any unnecessary worry but I feel justified in my action until Beryl proves to me that he is willing to act as a man should act under similar conditions for I do not expect great things all I ask is to be treated fair. . . .

"Best regards to yourself and Mrs. Cooper. Hoping you are not offended at what I have written."

It is conceded that the affections of the young couple were unimpaired when plaintiff departed for Illinois in November, 1914. Excerpts from counsel's brief read:

"Both sides offered evidence in this trial proving that appellee and Beryl had gotten along together lovely up until November 12, 1914, when appellee left for Illinois; . . . Appellee remained with her father in Illinois until in October, 1915, about eleven months. . . . During these eleven months of absence many letters passed between Beryl and appellee, and appellant Mrs. Cooper wrote to appellee one letter just after the birth of the child. . . . These letters show a growing alienation of Beryl's affection from appellee. . . . That during these months of absence Beryl never went to see appellee or his baby, although he wrote her suggesting she could borrow the money from her father to pay her fare home. . . . The appellants never sent the baby any presents. . . . That this was the first and only grandchild the appellants had ever had, and appellants, according to their own testimony, had shown no interest in the child at all; appellant Mrs. Cooper excusing herself for this lack of interest in the fact that she had never seen it. . . . Appellee feeling that herself and baby were abandoned by the baby's father, came back to Moran in October, 1915, to see if she could not persuade Beryl to resume his duties as husband and father. Upon her arrival at Moran she found that Beryl was attending school at Emporia, Kansas, his expenses being paid by appellants, and remonstrated with appellant about their sending Beryl away to school and

leaving her and her baby unprovided for; and asking them to recall Beryl which Mr. Cooper did. . . . Beryl returned to school at Emporia almost immediately, and they brought him down from there twice afterwards; though appellant Mrs. Cooper in her testimony said that she opposed his going to school, but said she thought it was a pity that he should have to stop school now that he had begun. . . . Appellants' whole conduct toward appellee was that of cool aloofness. Appellant Mrs. Cooper never called to see appellee or the baby; never had them to her home but once, and then appellee stayed over night and the next day when Beryl came from Emporia she hurried appellee and Beryl off up town. Appellee told appellant Cooper and Beryl that she required that Beryl go to work to support her and her child and get a doctor's certificate that he was not affected by a venereal disease, neither of which conditions were ever complied with. Appellants met appellee and her baby on the street of Moran and refused to see or recognize them."

This abridged statement from appellee's brief fairly indicates the situation as this court gleans it from an independent study of the abstracts. No alienation of affections existed prior to plaintiff's departure for Illinois. No malicious acts or conduct of defendants tending to cause alienation of their son's affection for his wife thereafter are disclosed to support and justify the judgment. The other errors need no consideration. The judgment of the district court is reversed, and the cause remanded with instructions to enter judgment for defendants.

JOHNSTON, C. J., and WEST, J., dissent from the holding that the evidence does not sustain the verdict and judgment.

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No. 21,088.

THE CITY OF TOPEKA, *Appellant*, v. JOHN RITCHIE and THE FIDELITY & DEPOSIT COMPANY, *Appellees*.

No. 21,615.

THE CITY OF TOPEKA, *Appellee*, v. JOHN RITCHIE and THE FIDELITY & DEPOSIT COMPANY, *Appellants*.

SYLLABUS BY THE COURT.

1. MOOT CASE—*Not Decided*. Case No. 21,088 having become moot is not decided, and the appeal is dismissed.
2. SEWER CONTRACT—*Indemnity Bond—Judgment against Contractor—Prima Facie Evidence of Surety's Liability*. A surety company gave a bond to save the city of Topeka harmless from "all liens, charges,

## City of Topeka v. Ritchie.

costs and damages of every kind or nature whatsoever. . . .” arising out of a sewer contract. The city recovered a judgment against the contractor for overpayments made by reason of the fraudulent measurements by an engineer, and brought this action against the contractor and the bonding company, more than three years having elapsed since such overpayments, but the judgment had been kept alive. The surety was not made a party to the action in which the judgment was rendered. *Held*, that the judgment constitutes a cause of action against the contractor, and is *prima facie* evidence of the surety company’s indebtedness on account of the overpayments, the contractor being execution proof.

3. **SAME—Action on Judgment—Statute of Limitations.** While the statute of limitations as to the contractor had run on the overpayments as a cause of action, an action on the judgment was not barred as to such contractor.
4. **SAME—Action on Surety Bond—Statute of Limitations.** When the overpayments were made, the cause of action to recover them back accrued in favor of the city against the principal and surety, and an action against the latter on its bond by reason of such overpayments became barred in five years.
5. **SAME—Petition—Statute of Limitations.** Each count of the fifth amended petition states a cause of action in respect to all items contained therein which did not accrue more than five years before the beginning of this action, and the order overruling the demurrer was proper.
6. **SURETY COMPANY—Right to Benefit of Statute of Limitations.** The defendant surety company was not, when this action was begun, an absent corporation within the purview of section 20 of the civil code.
7. **SEWER CONTRACT—Action to Recover Costs and Expenses—Statute of Limitations—Liability of Surety Company.** While ordinarily the costs form a part of a judgment, in this case those which accrued and were paid by the city within five years before this action was begun are not barred as to the surety company, although the overpayments for which the principal judgment was obtained were barred as to such surety.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed February 9, 1918. Affirmed. (Former opinion filed December 8, 1917, but not reported.)

*George P. Hayden*, and *Frank Drenning*, both of Topeka, for the appellant.

*Otis Hungate*, *T. F. Garver*, and *R. D. Garver*, all of Topeka, for the appellees.



The opinion of the court was delivered by

WEST, J.: Case No. 21,088 having become moot by reason of subsequent pleadings requires no consideration, and the appeal is dismissed.

Case No. 21,615: The city sued a contractor and the surety on his bond, The Fidelity & Deposit Company, setting up a judgment theretofore recovered against the contractor, Ritchie, December 28, 1912, on account of overpayments made by the city on the contract, also certain costs taxed therein, and another sum alleged to have been disbursed for extraordinary expenditures and attorney's fees incurred in the former suit. By amendments the matters were set out in two counts, the first setting up the judgment and the second the costs and expenditures. A demurrer to the petition thus amended was filed on the grounds that several causes of action were improperly joined, and that neither count stated facts sufficient to constitute a cause of action. This demurrer was overruled, and from that ruling this appeal is taken by both defendants, who contend that the Ritchie judgment did not constitute a cause of action against the surety company; that the extraordinary expenditures and attorneys' fees set up in the second count should have been recovered against Ritchie in the former cause and were not covered by the conditions of the bond; that there was a misjoinder of causes; and that the action is barred by the statute of limitations. *Ritchie v. City of Topeka*, 91 Kan. 615; 138 Pac. 618, and *City of Topeka v. Brooks*, 99 Kan. 643, 164 Pac. 285, furnish the history of the transactions leading up to the beginning of this action.

The bond contained this obligation:

"Now, therefore, if the said Hanley & Ritchie shall honestly and faithfully discharge, perform and fulfill all and singular the obligations of said contract and specifications, bound herewith, and shall save and hold harmless the said city from all liens, charges, costs, and damages of every kind or nature, whatsoever, then the above obligation to be void, otherwise to be of full force and virtue in law."

The comprehensive significance of this language is such that all the claims set forth in the amended petition before us are safely immured therein beyond the power of fugacity.

The effect of the judgment on the surety company presents a question about which courts differ, some holding that it has

no effect, others that it is conclusive, and others still that it is *prima facie* evidence of liability. The bond was to make good any loss or damage arising from the Ritchie contract, and the judgment against him was the deliberate conclusion of a court of competent jurisdiction that he had failed in the amount thereof in meeting his obligations to the city. It would seem unfair to hold the surety company bound by the result of an action to which it was not a party, but it would seem in line with common sense to hold that, as all judicial proceedings are presumed to be regular, it will be presumed that the court did not make a mistake in rendering this judgment, but as against the surety company it is to be deemed correct unless something marring its fairness on its face is brought up by way of proof. It has been held that a judgment of amercement against a sheriff is *prima facie* conclusive against the sureties. (*Fay v. Edmiston*, 25 Kan. 439; see same case, 28 Kan. 105.) A judgment against the principals on a note has been held *prima facie* evidence of liability against the sureties. (*Park v. Ensign*, 66 Kan. 50, 71 Pac. 230.) The analogy of these decisions is strong in support of the contention that this judgment is *prima facie* binding on the surety company. A well-reasoned opinion may be found in *Stephens v. Shafer and another, imp.*, 48 Wis. 54.

Whatever may have been the origin of the doctrine of merger, it is fully settled that a judgment absorbs the debt for which it was rendered, the latter being deemed merged in the former. (15 R. C. L., p. 782, § 236.) This rule is thoroughly established in this state.

"All causes of action upon which suit is brought and judgment obtained are merged in the final judgment and are thereby extinguished, and can not be made the foundation of a subsequent action or judgment." (*Price v. Bank*, 62 Kan. 735, syl. ¶ 1, 64 Pac. 637.)

(See, also, *Rossiter v. Merriman*, 80 Kan. 739, 104 Pac. 858; *Hayes Bros. v. Waggener*, 98 Kan. 740, 743, 161 Pac. 584.)

The fifth amended petition alleges that an action against Ritchie was begun December 18, 1907, and judgment in another action brought by Ritchie against the city was rendered December 28, 1912, modified by this court February 18, 1914, and execution issued on or about the — day of June, 1914. The present action was begun September 8, 1914. Although

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this judgment was based on alleged overpayments about February 1, 1906, it is of itself a distinct cause of action as to Ritchie. (15 R. C. L., p. 898, § 377; *Burnes v. Simpson*, 9 Kan. 658; *Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. 44.) The five-year statute would run if the judgment were not kept alive by execution prior to the expiration of the sixth year from its rendition. (*Angell v. Martin*, 24 Kan. 334, 336; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808; *The State v. Kansas Ins. Co.*, 32 Kan. 649, 654, 5 Pac. 190.) The action against the surety is really on its bond to require it to make good the amount of the Ritchie judgment for overpayments which occurred on or before February 1, 1906. The contract of the bonding company was for indemnity, to save the city harmless from loss. It was not to save from liability but from actual loss. The cause of action against the principal accrued when such overpayments were made and was not delayed until the discovery of the fraud which caused them. (*Jones v. School District*, 26 Kan. 490; *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518.) The law makes a clear distinction between a simple contract of indemnity against liability and one against loss.

"In the former case only does the common law rule that there is no cause of action until there is actual damage apply. In the latter case it has very generally been held that an action may be brought and a recovery had, as soon as the liability is legally imposed. . . . And generally, if the indemnity is against payment of money, the plaintiff must prove actual payment, or that which the law considers equivalent to actual payment, a mere legal liability to pay not being sufficient." (14 R. C. L., p. 55, § 13.)

"Where the condition of a bond . . . is to indemnify . . . against loss or damage, the cause of action accrues and the statute begins to run when and only when the loss or damage occurs, not when the act is done which causes the damage. . . . But as a general rule where the contract is to indemnify against loss or damage arising from the payment of money, the cause of action begins to run from the time when the indemnitee pays the money, not from the time when he becomes liable to pay it." (25 Cyc. 1093.)

The authorities in support of this rule are almost numberless and are so unanimous that a mere citation of a score or more would be of little assistance. Whenever one person may sue another a cause of action has accrued and the statute begins to run. (*McDaniel v. City of Cherryvale*, 91 Kan. 40, 43,

136 Pac. 899; 25 Cyc. 1066.) In this case the loss occurred when the overpayments were made, and on February 1, 1906, the city could have sued the contractor to recover such overpayments, and also the bonding company for the reason that actual loss had occurred, money had been paid out, the loss had arisen out of the sewer contract—a specific loss, not a mere liability—covered by the condition of the bond. Had the liability been merely upon the overpayments the statute would have run in three years, but as the liability of the company was on the bond by reason of such overpayments the statute ran in five years, which would be February 6, 1911, and this action was not begun until September 8, 1914. There is nothing in the bond, the statute, or the decisions, that suspends the running of the statute of limitations until the discovery of the wrongful overpayment, the reduction of the claim to judgment, or the ascertainment of the inability of a principal to pay.

The first cause of action so far as it consists of the judgment is barred as to the surety company. The items of court costs incurred in the litigation arising out of the overpayments, which costs were paid by the city within the five years' period, are not barred. It is urged that they are merged in the judgment and therefore affected by the same bar of the statute. But the allegations are that these costs have been paid by the city because they could not be collected from Ritchie, and to extend the bar so as to include them would be going beyond the spirit, if not the letter, of the law, for while overpayments which were merged in the judgment were barred as to the surety company, there is no magic or logic by which the costs incurred in obtaining such judgment and paid within the statutory period can fairly be said to have become barred prior to the date of their payment. By the other side it is contended that the surety company being a foreign corporation cannot invoke the statute of limitations. But section 20 of the civil code excepts the company from the class of absent corporations and puts it in the category of parties against whom the statute of limitations may run.

As that part of the first cause of action setting up the costs in question stated a cause of action as to both defendants, it was not error to overrule the demurrer to the first count.

The second count sets up large expenditures for taking depositions and employing engineers for remeasuring the work and in defending other causes in district and federal courts, all growing out of the default and opposition of the contractor. No reason is apparent why these claims should not, if proved, be recovered. All items set up in the second count which did not accrue more than five years before this action was begun are properly pleaded, and the order overruling the demurrer to the second cause of action is affirmed.

As the first count, aside from the Ritchie judgment, states a cause of action against both defendants, the fifth amended petition is not demurrable for misjoinder of causes.

The rulings of the trial court are affirmed, and the cause remanded for further proceedings.

JOHNSTON, C. J., and MARSHALL, J., dissent as to the fourth proposition of the syllabus and corresponding part of the opinion.

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No. 21,159.

B. M. MCCUE, *Appellant*, v. J. W. HOPE, *Appellee*.

OPINION DENYING A REHEARING.

Appeal from Finney district court; GEORGE J. DOWNER, judge. Opinion denying a rehearing filed February 9, 1918. (For original opinion see 102 Kan. 147.)

*F. Dumont Smith*, of Hutchinson, for the appellant.

*William Easton Hutchison*, *Albert Hoskinson*, *R. W. Hoskinson*, and *C. E. Vance*, all of Garden City, for the appellee.

The opinion of the court was delivered by

MASON, J.: The plaintiff on his appeal complained of the admission of evidence offered by the defendant upon an issue not raised by the answer. Of this complaint it was said in the original opinion that, while the evidence was objected to on other grounds, no objection was made to it as not being within the pleadings, and that it did not appear that the plaintiff suffered

any substantial prejudice from the broadening of the issues, no delay having been asked to give opportunity to produce further evidence on his part. In a petition for a rehearing it is said that although the specific objection referred to was not shown in the abstract, it was in fact made. Treating this statement as effecting an amendment in the abstract, we are of the opinion that the admission of the evidence is not a just ground of reversal, for the other reason given—that the defendant suffered no actual prejudice, not being deprived of a full opportunity to meet the defendant's claims. Both in the plaintiff's brief and in the petition for a rehearing the trial court is spoken of as having said that the action was one for remaking the contract between the parties. What the court said was that the action was one "to reopen the account and settlement and remake it in accordance with the agreement of the parties." We interpret "it" as referring to the settlement, not to the contract.

The rulings referred to in the petition for a rehearing have been reexamined and the court remains of the opinion that no reversible error has been shown. The grounds upon which a reversal is asked seem to us to involve the merits of the controversy over the facts. We do not regard the evidence as justifying this court in overturning the judgment. No special findings were made, and the separate conclusion of the jury as to the different items involved is not shown.

The petition for a rehearing is denied.

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No. 21,216.

HARRIET M. BERRY, as Administratrix, etc., *Appellee*, v.  
CHAUNCEY DEWEY et al., *Appellants*.

No. 21,217.

WILLIAM ROY BERRY, *Appellee*, v. CHAUNCEY DEWEY et al.,  
*Appellants*.

## SYLLABUS BY THE COURT.

1. CHANGE OF VENUE—*Disqualification of Regular Judge—Calling in Judge of Another District.* Where a change of venue is granted on account of the disqualification of the regular judge, and under section 57 of the code (Gen. Stat. 1915, § 6947) the judge of another district is called in, who, after trying some of the issues in the case, declines, on account of press of business in his own district or for any other reason, to act further, it then becomes the duty of the regular judge of the district court where the case is pending to request the judge of some other district to attend and serve as judge. The jurisdiction of the judge first called in ends with his refusal longer to sit as judge in the case.
2. MOTION FOR JUDGMENT—*No Other Pleadings Required—Notice of Hearing.* Answers or other pleadings to a motion are not required, and there is no provision for making up issues for the trial of motions. On the hearing of a motion for judgment against the defendant on a stipulation in the action, the defendant, by filing an answer to the motion, does not thereby become entitled under the provisions of section 313 of the code (Gen. Stat. 1915, § 7215) to three days' notice of the hearing.
3. SAME—*Written Stipulation—Used on Application for Continuance—Estopped to Deny its Validity.* Where the defense to a motion for judgment on a written stipulation is, that it was not signed by the defendants but by an attorney who had no authority to act for them, it is proper to admit in evidence an application for a continuance of the action sworn to by the defendants' attorney, and which refers to the stipulation as a ground for the continuance; and *held*, further, that having made use of the stipulation to obtain the advantage of a continuance, the defendants should not be permitted to interpose as a defense to the motion the fact that the stipulation was not signed by them individually.
4. ACTIONS FOR DAMAGES—*Settlement by Written Stipulation—Time of Payment Fixed—Interest on Payments.* A written stipulation for settlement of a damage suit fixed the defendants' liability to the plaintiff at the sum of \$4,500, which amount the defendants agreed to pay to the plaintiff when certain criminal cases pending against the

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defendants were finally terminated, and it was agreed that if the sum was not paid within ten days after the final termination of the criminal actions, judgment should be rendered in favor of the plaintiff and against the defendants for the sum agreed upon. When the criminal prosecutions terminated, defendants brought an action to enjoin the enforcement of the stipulation and delayed the taking of judgment for several years. *Held*, that it was proper for the court to include in the judgment interest, on the sum agreed to be paid, from the time the criminal cases terminated.

5. CONTINUANCE REFUSED—*No Abuse of Discretion*. On the facts stated in the opinion, it is held there was no abuse of discretion in the refusal to grant a continuance on account of absent witnesses, because no diligence was shown.

Appeals from Sherman district court; JACOB C. RUPPEN-  
THAL, judge *pro tem*. Opinion filed February 9, 1918. Af-  
firmed.

*William R. Smith*, of Topeka, *James H. Harkness*, and *Clif-  
ford Histed*, both of Kansas City, Mo., for the appellants.

*A. M. Harvey*, of Topeka, and *L. W. Colby*, of Beatrice, Neb.,  
for the appellees.

The opinion of the court was delivered by

PORTER, J.: On April 17, 1905, Harriet M. Berry, as ad-  
ministratrix of her husband's estate, brought her action  
against the defendants for damages for the alleged unlawful  
killing of her husband by the defendants in a shooting affray  
which occurred June 3, 1903, and William Roy Berry sued to  
recover damages for injuries he received in the same affair.  
Actions were also brought against the defendants by other  
persons for like damages. At this time criminal prosecutions  
for the murder of Daniel P. Berry and others were pending  
against these defendants; and sometime after the civil suits  
were commenced there was a written stipulation for the  
settlement of three of the civil actions, by which it was agreed  
that the defendants' liability to the plaintiffs in three of the  
actions amounted in the aggregate to the sum of \$10,000,  
which amount was to be paid to the plaintiffs when all the  
criminal cases connected with or growing out of the trans-  
actions or injuries described in the civil actions had been  
finally terminated; and of the aggregate sum, Harriet M.



Berry, as administratrix, was to be paid \$4,500, and William Roy Berry \$1,000. The stipulation recited that it was a compromise of the civil cases, and that no part of the sum was due or to become due until the final termination of the criminal prosecutions.

On May 2, 1905, the state dismissed all the criminal cases "without prejudice," and thereupon the attorneys for these plaintiffs placed the stipulation on file, together with a motion for judgment in accordance therewith. Chauncey Dewey appealed the criminal cases to the supreme court, contending that they should have been dismissed with prejudice. That appeal was decided in favor of his contention February 9, 1907. (*The State v. Dewey*, 73 Kan. 739, 88 Pac. 881.) The defendant, Dewey, then brought a suit in the federal court to enjoin these plaintiffs from enforcing the stipulation, and that action was not determined until June, 1915, when the injunction was denied and the restraining order dissolved. When these cases were called for trial at the June term, 1915, Judge Chas. I. Sparks, district judge, stated that he was disqualified by reason of having been of counsel for plaintiffs in the actions, and, after a consultation with the attorneys, announced that he would request Judge W. S. Langmade, of the Seventeenth judicial district, to try all the Berry cases, and Judge Langmade was called in to try these cases. The selection was in accordance with the provisions of section 6947 of the General Statutes of 1915. When the cases were called for trial before Judge Langmade, defendants filed a written protest against any proceedings upon the motions for judgment and asked that the same be stricken from the files, and also asked for a jury trial. These matters were taken under advisement by Judge Langmade until May 26, 1916, when the protest of the defendants was overruled, but their demand for a jury trial sustained. One of the civil suits in which there was no stipulation for judgment had, in the meantime, been tried before Judge Langmade. On May 26, 1916, when Judge Langmade ruled on the motions and protests filed by the defendants' he announced that on account of press of business in his own district, he would be unable to proceed further in the Berry-Dewey cases. All the cases went over until on the 22d day of November, 1916, when Judge Sparks, sitting as the

regular judge of the court, made an order calling in Judge J. C. Ruppenthal, of the twenty-third district, to try the cases, for the reason that Judge Langmade was unable to be present and serve as judge. The journal entry of the district court of Sherman county recites that the matter came on for hearing at that time, the attorneys for plaintiffs being present, defendants not appearing. It recites that the presiding judge of the district was disqualified to sit, the proceedings by which Judge Langmade had been called in to preside, the fact that he was no longer able to attend and had declined to sit further; it recites that both Judge Langmade and Judge Sparks had requested Judge Ruppenthal to attend as judge and try the cases, and the taking of the oath by Judge Ruppenthal. It appears also that Judge Langmade granted a motion of the plaintiffs for a change of venue, and Judge Ruppenthal was called in. On November 28, 1916, the cases were called for trial by Judge Ruppenthal, at which time the defendants objected orally and by answer to his proceeding with the cases. These objections were overruled, and the cases were tried before a jury, and judgments rendered in plaintiffs' favor.

1. The first question raised by the appeal is whether Judge Ruppenthal had jurisdiction to sit as judge. The defendants contend that Judge Langmade having been called in to try the cases in the first instance by reason of the disqualification of the regular judge, he could not divest himself of jurisdiction by refusing to try the cases; that he was the only judge that could sit until he became disqualified for some of the statutory reasons, and that any attempt to transfer the cases to Judge Ruppenthal was without authority and void. This contention is readily disposed of by the fact that Judge Sparks, whose duty it was to see that the business in his court proceeded, notwithstanding his own disqualification to sit in the cases, made an order calling in Judge Ruppenthal when it appeared that Judge Langmade was unable to proceed further in the cases. There is nothing substantial in the contention that, because Judge Langmade was first selected to sit, he must continue as judge unless disqualified by reason of interest in the proceedings, or because of some of the statutory disqualifications. He was not obliged in the first instance to accept the appointment; had he declined, it would have been the duty of

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the regular judge to call in another judge to try the cases. The situation was no different because, having assumed jurisdiction for a time and presided in the cases, Judge Langmade was prevented from acting further because of his duties in his own district. For reasons which he deemed sufficient, he declined to try these cases; and while we agree with defendants' counsel that his refusal to sit further amounted to a resignation, we cannot agree with counsel's contention that any confusion resulted by such resignation. When the facts became known to the regular district judge, it became his duty to make an order calling in another judge as provided by the statute. This is exactly what Judge Sparks did, and the validity of the proceedings is not in any sense affected by the fact that Judge Langmade thought proper to grant a change of venue also. We think the question is so plain as not to require the citation of authorities; and we know of none from other states involving the question.

2. In support of the contention that it was error to refuse defendants' request for three days' time to prepare for trial after the filing of the answer to the motion for judgment, section 313 of the code is relied upon:

"Actions shall be triable on the issues of fact in ten days after the issues are made up. Issues of law and motions may be tried by the court or judge in term-time or vacation, at such times as the court or judge may fix, after reasonable notice, which shall not be less than three days." (Gen. Stat. 1915, § 7215.)

There is no provision for making up issues for the trial of motions. A motion is one thing and an action is another. No answer or other pleading to the motion was required, although the practice of stating in writing the contentions against the allowance of a motion may in many cases be entirely proper. The motion had been on file for many years, and the defendants had more than three days' notice of the hearing before the cases were called.

3. It is said error was committed in permitting plaintiffs to offer in evidence an application for a continuance of these cases made in the year 1906. The so-called answer to the motion for judgment on the stipulation alleged as one defense that the stipulation, which was signed on the part of plaintiffs by Mr. Colby, their attorney, and in the names of all the de-

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fendants by "W. S. Morlan, their attorney," is not binding upon the defendants, because Morlan was their attorney only in the criminal cases, and had never represented them in these cases, and had no authority to bind them by the stipulation. The settled rule in this state is, that abandoned pleadings or other papers filed in the action are admissible in that action. (*Every v. Rains*, 84 Kan. 560, 115 Pac. 114, and cases cited.) The reasons apply also to pleadings or papers filed by the same party in another action. (*Solomon Rld. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Arkansas City v. Payne*, 80 Kan. 353, 102 Pac. 781; *Bank v. Edwards*, 84 Kan. 495, 115 Pac. 118.) In *Watt v. Railway Co.*, 82 Kan. 458, 108 Pac. 811, it was held that an abandoned pleading should be received in evidence for what it was worth, and in *Meek v. Deal, Adm'x*, 87 Kan. 319, 124 Pac. 160, a judgment was reversed because of the exclusion of an original petition offered in evidence by defendant, containing statements at variance with an amended petition on which the case was tried. But two witnesses were sworn on the trial of the motion. Mr. Colby, one of the attorneys for the plaintiff, testified that Morlan signed the stipulation when Dewey was present and with Dewey's knowledge. Mr. Dewey denied this and said that he had never heard of the stipulation until a long time afterwards. The application for the continuance was sworn to by the late W. H. Rossington. It substantially made the stipulation a part of the application as follows:

"Referring to a stipulation of settlement on file herein, under the same no trial can be had or no determination of the above entitled cause until the criminal cases referred to in said stipulation are finally heard and determined."

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The application then stated, in substance, that until the determination by the supreme court of Dewey's appeals in the criminal cases, the plaintiffs "cannot enforce the terms of said stipulation for settlement." There was, of course, no error in introducing the stipulation in evidence for what it was worth, and it might be added that in our opinion it was worth a great deal. Having made use of the stipulation to obtain the advantage of a continuance and delay of these same cases for several years, defendants should not be permitted to interpose as a defense the fact that the stipulation was not signed by

them individually. We think the application for the continuance was admissible and might have been taken notice of by the court, without its introduction, as evidence of a ratification by the defendants. In answer to a special question, the jury found that W. S. Morlan was authorized and empowered by the defendants to make and enter into the stipulation and agreement.

4. The jury returned a verdict in favor of plaintiffs for the respective sums each was to be paid by the terms of the stipulation. Thereupon, the plaintiffs asked the court to render judgment which should include interest on these sums from the 21st of February, 1907. Over defendants' objections the court sustained the motion, and judgment was rendered in favor of Mrs. Berry for \$7,140, and in favor of William Roy Berry for the sum of \$1,585.35. It is claimed that the court erred in rendering judgment for more than the specific sums agreed upon in the stipulation. The stipulation, after reciting the payments agreed upon for each plaintiff, then proceeds as follows:

"If after all of said criminal cases have been finally terminated, the said sum of ten thousand (\$10,000.) dollars is not paid in ten (10) days, judgment may be rendered in said cases in favor of the plaintiffs and against defendants."

Defendants argue that this was an attempt to settle an unliquidated damage suit, and that it was the obvious intention of the parties that judgment should be entered for these specified sums, and not that judgment should be entered upon the stipulation with interest to the time of entering the judgment; and that in the absence of any provisions for interest in case payment was not made, the penalty should not be interest, but a judgment entered. Attention is also called to the fact that a verdict rendered by a jury does not bear interest from the date of its rendition to the time judgment is rendered, and to the statutory provision that creditors shall be allowed interest at six per cent per annum when no other rate of interest is agreed upon for money after it becomes due, or for money due on a settlement of account from the date of ascertaining the balance; and it is urged that interest cannot be allowed by reason of the statute. There was no stipulation

that the amount should become due "except when a judgment should be rendered."

There is nothing ambiguous about the stipulation. It agrees upon the amount each plaintiff was entitled to and the time when it should become due. The actions were no longer unliquidated damage suits. The damages became liquidated and determined by the stipulation, and plaintiffs, in default of payment within ten days after the final disposition of the criminal cases, were entitled to their separate judgments for these liquidated sums. Under the statute the plaintiffs were entitled to interest at six per cent per annum for the sums due, after they became due. If there was any question for submission to a jury in these cases, it could not have involved the amount of the judgments to be rendered. The only issue that should have been submitted to a jury, conceding that it was a jury case, was whether the defendants were bound by the stipulation; and as to that, we think the court would have been justified in sustaining the motion without submitting any question to a jury. This conclusion disposes of the contentions urged in the appeal to the effect that the plaintiffs were not entitled to recover because the motion stated no facts sufficient to constitute a cause of action. The plaintiffs were entitled to judgment on the stipulation on file in the cases. For the same reason, it is unnecessary to comment upon the admissibility of the testimony of Mr. Colby to a conversation between himself and W. S. Morlan, who had been attorney for the defendants in the criminal cases. Whether the evidence would ordinarily be admissible need not be determined, since it could not have prejudiced the defendants. So with respect to the admission of other evidence complained of.

5. As a second defense to the validity of the stipulation, defendants alleged that it was void and against public policy, because it was entered into for the purpose of compounding a felony. No evidence was introduced on this defense, but it is urged that it was an abuse of discretion to refuse their application for a continuance on the ground of the absence of William Roy Berry and other witnesses, who, the affidavit for continuance alleged, would, if present, swear that such was the purpose of the plaintiffs in agreeing to the stipulation. There was no abuse of discretion in refusing the application,

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because there was no diligence shown; indeed, after all the delays in these cases and the many years defendants had for securing testimony to establish whatever defenses they intended to urge, it is doubtful if they could have shown such diligence as would appeal to a court's discretion or have entitled them to a further continuance.

The judgments are affirmed.

WEST, J., not sitting.

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No. 21,261.

C. W. EASTMAN, *Appellee*, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Personal Injuries—Negligence Alleged Not Proven.* The plaintiff alleged that the defendant's roadmaster directed him to board a car which it had negligently left in an unsafe condition. The jury found the negligence to consist of the direction of the roadmaster to board the car. *Held*, that as the negligence charged was not proved the plaintiff cannot recover.
2. SAME—*Proper Special Questions.* It is proper practice to request the jury to find what the defendant's acts of negligence were.
3. SAME. A submitted question is examined and found not to contain any pitfall or trap for the unwary juror.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Reversed.

*William R. Smith, Owen J. Wood, and Alfred A. Scott*, all of Topeka, for the appellant.

*E. C. Wilcox, Myrtle Youngberg*, both of Anthony, and *H. C. Kirkendall*, of Cherokee, Okla., for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff, a section foreman, recovered a judgment for injuries received in boarding a passenger train. The defendant appeals.

The petition alleged that, being where his duties of inspecting the track and superintending the repair thereof required him to be, he was ordered and motioned by the roadmaster,

who was standing on the platform of a coach of one of defendant's trains, to get on the back end of the coach and ride with him to the depot. That the defendant had negligently failed to provide the coach with proper steps, but had permitted them to get old and worn and slanted and covered with sleet and ice, and in attempting to get on the car he slipped and fell and was dragged and injured. The jury found that the slipping of plaintiff's hands off the handholds caused him to fall; that the train was moving about a mile an hour when the roadmaster motioned or told him to get on board, and four or five miles an hour when the plaintiff received his injury; that the roadmaster directed him to get on when, to any one using ordinary prudence, it was obviously of great danger for plaintiff to make the attempt; that if he had attempted to board the car where the roadmaster was standing when first told so to do he would not have gotten on without injury; that the plaintiff was damaged \$1,300, to which he contributed \$300 by his own negligence.

"Q. 2. If you find for plaintiff, then state in what respect the defendant was negligent, at the time and place in question. Ans. The defendant company was negligent in that roadmaster Carpenter requested or signalled the plaintiff to board this train."

It will be observed that there was no allegation of negligence on the part of the roadmaster, and the jury found none regarding the condition of the train. The defendant therefore invokes the rule that the charged negligence was not found and hence there can be no recovery. To this the plaintiff responds that the found negligence is restricted to the immediate time and place of the injury and should be construed together with the general verdict, the finding meaning that the roadmaster was negligent in directing the plaintiff to board the train, and the general verdict meaning that the company was negligent in respect to the condition of the car. The trouble with this argument is that the jury had a chance and were specially requested to advise the parties what the defendant's negligence consisted of, and left out everything but the direction to get on board, something which the plaintiff had not in his petition denounced or even denominated as negligence. (*McBeth v. Railway Co.*, 95 Kan. 364, 148 Pac. 621; *Spinden v. Railway Co.*, 95 Kan. 474, 480, 148 Pac. 747;



*Case v. Yoakum*, 99 Kan. 253, 161 Pac. 642; *Parks v. Railway Co.*, 100 Kan. 219, 163 Pac. 1066.)

The plaintiff also appeals and complains that the court permitted the jury to answer the quoted question No. 2, and also No. 9, which, with its answer, is as follows:

“Q. 9. Did the roadmaster Carpenter direct the plaintiff to get on the train when to anyone using ordinary prudence it was obviously of great danger for plaintiff to attempt to get on? A. Yes.”

The objection to No. 2 was that it was “improper to require the jury to enumerate the acts of negligence by a question so formed, and to No. 9 that it was formed in such a way that it was liable to mislead the jury and cause an answer the reverse of their intention.” It is urged that the jury should not have been left to say what the defendant's negligence was, but should have been given a direct question which could be answered by yes or no. This very sort of question, however, was held proper in *Cole v. Railway Co.*, 92 Kan. 132, 139 Pac. 1177, and in *Adams v. Railway Co.*, 93 Kan. 475, 144 Pac. 999.

Question No. 9 is referred to by counsel as one “framed by the most skilled wording of high classed specialists, calculated to induce a miscarriage of justice,” and it is said that if the answer is *yes* it finds the defendant guilty of contributory negligence, and if *no* it finds the defendant guilty of no negligence. But this does not condemn the question which asks for something which the parties have a right to know, and in which we fail to discover any pitfall or trap to catch the unwary juror.

We have overlooked nothing suggested by either side, and fail to find in the record any error materially prejudicial to the plaintiff, but are impelled by the settled rule heretofore repeatedly announced to hold that the negligence relied on by the plaintiff was not shown, and hence that he failed in his action and cannot recover.

The judgment is reversed with directions to enter judgment for the defendant.

No. 21,262.

T. T. ALFORD, *Appellant*, v. W. H. DENNIS et al., Partners, etc.,  
et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. OIL AND GAS LEASE—*Improvident Contract—Cancellation*. Rule followed that equity will not cancel a contract which is merely a bad or improvident bargain.
2. SAME—*Breach of Implied Covenant—Forfeiture*. Rule followed that equity will not arbitrarily declare a forfeiture for breach of an implied covenant.
3. OIL AND GAS LEASE—*Failure to Develop—Remedy in Damages—Prompt Development or Cancellation*. A lease of two tracts of land, 716 acres and 220 acres respectively, was made in 1902 to prospect for oil and gas, for a term of ten years and as much longer as gas or oil might be found in paying quantities, the lessees agreeing to pay royalties on all paying wells and binding themselves to commence operations within six months, and to complete three wells before January 1, 1904, "no other or additional expense shall be incurred under this lease," etc. The larger tract was developed and many wells were drilled thereon, but in nearly fourteen years nothing was done towards drilling or developing the smaller tract. Plaintiff succeeded to the ownership of the latter and brought suit to cancel the lease, alleging that there was an implied covenant to prospect and develop his tract as well as the other. No demand was made on the lessees to drill on the plaintiff's tract prior to the commencement of this action. *Held*, that the ordinary rule that equity will not relieve against an improvident bargain prevents an absolute forfeiture, that equity will not forfeit a contract for the mere breach of one of its implied covenants; but *held*, also, that the petition stated a cause of action for some redress, either in damages, if such be ascertainable, or in the alternative that the lessees be required to drill and develop plaintiff's land within a reasonable time pursuant to their implied covenant, under penalty of forfeiture, following the doctrine announced in the fourth paragraph of the syllabus of *Howerton v. Gas Co.*, 82 Kan. 367, 108 Pac. 813.

Appeal from Chautauqua district court; ALLISON T. AYRES, judge. Opinion filed February 9, 1918. Reversed.

J. A. Ferrell, of Sedan, for the appellant.

W. H. Sproul, of Sedan, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: This is an equitable action to cancel an oil and gas lease of certain lands for failure to prospect and develop them.

In 1902, the grantor of the lease owned some 936 acres of land in two separate tracts, one of 220 acres and the other of 716 acres. The two tracts were about two miles apart. These lands were leased in one contract evidenced by one written instrument to the defendants for ten years and "as much longer as gas or oil may be found in paying quantities." The contract acknowledged receipt of one dollar as consideration, bound the lessees to pay certain royalties, and—

"It is mutually agreed that the parties of the second part shall begin operation under this lease within six months from the delivery hereof, and complete on or before the first day of January, 1904, three wells on the above described lands, no other or additional expense shall be incurred under this lease by the second party, and this lease shall be binding so long as second parties shall comply with their obligations hereunder, otherwise, this lease shall be null and void and no longer binding on either party."

As time passed, the plaintiff as one of the heirs of the grantor succeeded to the title to the 220 acres, and in 1916 he commenced this action. His petition alleged, among other matters, that defendants had drilled twenty-five oil wells, gas wells, and dry holes on the larger and separate tract of 716 acres, and that defendants paid royalties on the paying wells thereon to the present owners thereof; but that in all the thirteen years or more since the lease was executed no drilling or development of any sort had ever been undertaken on the 220 acres now owned by him, nor any attempt at exploration or development thereof, nor any attempt made to take possession of that tract of land; that it was one of the implied covenants and the intention of the parties to the lease that his tract of land (as well as the other) should be drilled and explored for gas or oil and not held indefinitely without exploration; that in that community there had been three distinct "oil booms," in 1904-05, in 1912-13, and in 1915-16; that plaintiff had had several opportunities to lease his land to other parties for gas or oil development, one of whom offered him a dollar per acre if the unused lease of 1902 held by defendants

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was extinguished. Plaintiff further pleaded that defendants had wholly abandoned their rights under said lease to his land; that the lease had long expired; that some weeks prior to bringing his action he had demanded of defendants that they discharge the lease of record; that they failed to satisfy such demand; and that the lease constituted a cloud upon his title; and that he had no adequate remedy at law, etc. Plaintiff prayed for a cancellation of the lease so far as it affected his land, etc., and for such other relief as might be equitable and just.

Defendants' demurrer to this petition was sustained and plaintiff appeals.

Both tracts of land were covered by the one contract of lease. It was improvident for the owner to grant a lease of two large tracts of land for a long term on such meager specified requirements of exploration and development as those particularized in this contract, and without providing that a certain minimum of work should be done on each tract. But it is not the province of the courts to end a contract merely because it is a bad bargain. (*Rose v. Lanyon*, 68 Kan. 126, 74 Pac. 625; *Marble Company v. Ripley*, 77 U. S. [10 Wall.] 339, 356.) Plaintiff may have some redress in damages for breach of the alleged implied covenant "that it was the intention of the parties to the lease" that plaintiff's "tract of land (as well as the other) should be drilled and explored for gas and oil and not held indefinitely without exploration." (*Core v. Petroleum Co.*, 52 W. Va. 276.)

In *Harness v. Eastern Oil Co.*, 49 W. Va. 232, it was held that where two separate tracts of land were leased under one contract, and only one of the tracts was prospected and developed for gas and oil, equity would not cancel the lease on the undeveloped tract, but in the opinion it was said:

"The principles of equity would not permit the lessees, without consideration, to hold the lease indefinitely for speculative purposes, to the prejudices of the interests of the lessor." (p. 250.)

The plaintiff asks the court to cancel this contract, to decree a forfeiture of it, and not for default of any expressed provision of the contract but merely for default of one of its implied covenants. The instances are rare where equity will enforce a forfeiture. It will never do so where less drastic redress

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will satisfy the demands of justice. (*Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213.) Forfeitures of oil and gas leases for breaches of mere implied covenants are seldom decreed. (*Davis v. Gas Co.*, 78 Kan. 97, 96 Pac. 47; *Brewster v. Lanyon Zinc Co.*, supra; Thornton on the Law Relating to Oil and Gas, 2d ed., §§ 91, 157.)

In *Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47; 82 Kan. 367, 108 Pac. 813, the failure to market the product of one gas well and to proceed with reasonable diligence to prospect for and to develop others was held insufficient to summarily forfeit the lease, and the cause was remanded with instructions to permit the lessor to prove his damages if such proof was available, and for the trial court to determine whether an adequate remedy at law for failure to develop was practicable, and it was further ordered that if redress in damages could not be applied an alternative decree might be entered, upon proper proof, providing that the defendant should proceed within a reasonable time to drill the necessary wells to develop the property, or failing therein that the lease be canceled.

It seems that in principle the case at bar is subject to similar disposition. The clause in the lease providing that "no other or additional expense should be incurred" seems fairly susceptible of restriction to the acknowledged obligation to drill three wells, etc., prior to January 1, 1904; and such interpretation is more rational and just than to say that it exempted the lessees from developing plaintiff's separate tract of 220 acres to any extent or at any time—even in fourteen years. Unless the plaintiff's tract was to be developed some time there was no reason to include it in the lease, and as it stands it is of no value to defendants. Unless the defendants had a *bona fide* intention to prospect and develop this tract they had no proper purpose in leasing it, and to cancel the lease will do them no injury. While equity abhors forfeitures it likewise abhors injustice.

Since plaintiff's lands are burdened with an oil and gas lease he is entitled to have those lands prospected for oil and gas within a reasonable time.

"On principle, it would seem that there is such implied covenant in the written instrument. When no time is fixed for the performance of a contract, a reasonable time is implied. When a contract for the erec-

tion of a house or other structure is silent as to the quality of the materials or workmanship, it is implied that the same should be a reasonable quality. In a lease of a farm for tillage on the shares, it is implied that the tenant shall cultivate the farm in the manner usually done by reasonably good farmers. So, under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands and reasonably protect the lines." (*Harris v. The Ohio Oil Co.*, 57 Ohio St. 118, 127.)

(See, also, Note, 20 Ann. Cas. 1165, *et seq.*)

Plaintiff's petition stated a cause of action of some sort. It narrated a predicament capable of some legal or equitable redress, not necessarily the redress prayed for by plaintiff. (*Eagan v. Murray*, ante, p. 193, syl. ¶ 2.) Indeed, a critical reading of defendants' brief discloses that this conclusion has been anticipated by their counsel, who cautiously mentions the possible ascertainment of damages, and, failing there, that the plaintiff should proceed "by making the necessary demands upon the lessee to do the desired drilling, giving the lessee a reasonable time in which to do it."

We think this lawsuit will answer the purpose of a demand for drilling; and that justice between the parties will be best subserved by remanding the cause to the trial court with instructions to set aside its ruling on the demurrer, and to permit issues to be joined and the pertinent facts determined, to allow plaintiff damages if they can be definitely ascertained; and in the alternative that the defendants be required to proceed in good faith to prospect and develop plaintiff's lands within a reasonable time, to be fixed by the trial court, and on failure of the defendants so to do that the lease of plaintiff's lands be canceled, in harmony with the views herein expressed and in harmony with the doctrine announced in the fourth paragraph of the syllabus of *Howerton v. Gas Co.*, *supra*.

Reversed.

No. 21,263.

FRED L. STEVENS, *Appellant*, v. A. E. VERMILLION, *Appellee*.

## SYLLABUS BY THE COURT.

**PROMISSORY NOTE—Pleading—Omission of Indorsement on Copy of Note—Amendment of Petition.** In an action upon a promissory note, where it had been alleged that the note had been purchased and transferred to plaintiff in due course, but the copy of the note set forth in the petition failed to show a written indorsement of the note, and where upon the trial evidence was received, without objection, of a transfer of the note by a written indorsement before maturity, and the case was tried by the parties as if the plaintiff was a holder in due course, the court, on objection to the sufficiency of the petition at the close of the evidence, should have allowed plaintiff to amend his petition to conform to the proof.

Appeal from Morris district court; ROSWELL L. KING, judge.  
Opinion filed February 9, 1918. Reversed.

*Edwin Anderson*, of Council Grove, and *Frans E. Lindquist*, of Kansas City, Mo., for the appellant; *Guy S. Calkins*, of Iowa City, Ia., of counsel.

*Malcolm B. Nicholson*, and *William J. Pirtle*, both of Council Grove, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action upon a promissory note, which the plaintiff claimed he had acquired before maturity, in due course, for value, and without notice of any infirmity. The defendant admitted the execution of the note, but denied that plaintiff purchased the same before due or was the owner or holder thereof. He set up a transaction that he had with the original payee, which he says was illegal and fraudulent, and which resulted in a failure of consideration for the note. In the trial the plaintiff offered testimony tending to show that the note was duly indorsed and transferred before it was due, and that the plaintiff was a holder in due course. The defendant offered testimony for the purpose of showing that the note was not transferred before it was due and was therefore open to defenses he had against the original payee, upon which evidence was produced. When the evidence

was closed the court, without motion or objection, suggested the insufficiency of the petition, saying that counsel had been laboring under a mistaken view as to the pleadings and that under the petition the plaintiff had obtained title by purchase and assignment and not by indorsement. Plaintiff then asked for leave to amend the petition to conform to the proof, but this was refused for the reason, as the court said, that "the defendant has consumed all this time making a defense under your pleading as it stands. If it had been plead they might have taken other testimony and appeared and cross-examined your witnesses," and a verdict against the plaintiff was directed.

Under the circumstances we think the amendment should have been allowed. It appears that the indorsement on the back of the note was omitted from the copy set out in the petition. In a former action on the note the indorsement was set forth, but this action was dismissed; and in the present one, begun five months later, a copy of the indorsement was not included in the petition, nor did the petition contain an express allegation that the note was transferred by indorsement. It is alleged that before maturity the payee of the note—

"sold, assigned and transferred said promissory note to the First National Bank of Iowa City, Iowa, and that said First National Bank of Iowa City, Iowa, purchased the said promissory note, *in due course* for value and without notice of any infirmities; that thereafter, the said First National Bank of Iowa City, Iowa, for value received, sold, assigned and transferred said promissory note to this plaintiff, who is now, and ever since the purchase thereof has been, the owner and *holder thereof, in due course.*"

In alleging that the note had been transferred in due course and that plaintiff had become the holder in due course it is manifest that the pleader attempted to allege a transfer by indorsement, and that the omission of the indorsement in the copy was an oversight. According to the negotiable instruments law a holder in due course takes the instrument on the conditions:

"(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." (Gen. Stat. 1915, § 6579.)



In another section it is provided that—

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment or [of] the instrument for the full amount thereof against all parties liable thereon." (Gen. Stat. 1915, § 6584.)

By alleging that the note had been transferred in due course and that he was the holder of it in due course, plaintiff, in effect, alleged that it had been negotiated to him before it was due, and that he took it free from defenses that would have been available to defendant as against the original payee. The pleading, however, was inconsistent, inasmuch as the copy of the note showed that it was payable to order, and the act provides that—

"If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery." (Gen. Stat. 1915, § 6557.)

So, while there was a conflict in the averments of the petition relating to the negotiation of the instrument, there was a manifest attempt on the part of the pleader to allege a negotiation of the note that would make plaintiff a holder in due course.

The case was tried by the parties as if the note had been properly indorsed. Proof of the indorsement was offered without objection by the defendant. When the note itself was introduced showing the indorsement on the back bearing date prior to its maturity it was received without objection. No question of the insufficiency of the petition was raised when the proof was given of the indorsement of the note by the payee to the bank and by the bank to the plaintiff. Aside from the fact that the case was tried as if the note had been properly negotiated by indorsement, the evidence relating to the indorsement and transfer was in depositions, which were on file months before the trial, so that the defendant had notice that plaintiff was claiming to be a holder in due course.

While the amendment of a pleading after the trial has begun is largely a matter of discretion, the courts are, and should be, liberal in the allowance of amendments where there is a mistake or oversight and where no one will be prejudiced thereby and the parties have proceeded as if the proposed amendment was

included in the pleading. In *Malone v. Jones*, 91 Kan. 815, 139 Pac. 387, it was said :

"Leave to amend a pleading during the trial is ordinarily a matter of discretion, but an amendment to conform to the proof should be allowed when a mistake appears and the amendment will not prejudice the adverse party. The plaintiff would not have been taken by surprise if the amendment had been allowed, for he gave the testimony which made it proper." (p. 817.)

When testimony is offered on a matter inadvertently omitted from the pleading, courts ordinarily authorize amendment or treat the pleading as amended. In the present case, if the issues had been submitted to a jury upon proof and a verdict obtained, and on appeal a question had been raised as to an omission of a copy of the indorsement from the petition, the court would necessarily have held that as the testimony had been received the same as if the fact had been fully pleaded, and as the case had been tried as if the question was in issue, the case would be treated as if the amendment had been made. In a case where it was held that there had been an abuse of discretion in refusing to set aside a judgment rendered in the absence of an attorney who failed to reach the court in time for the trial and whose absence involved negligence, it was held that as the mistake of the attorney and the ruling of the court would result in a sacrifice of the rights of the defendant, the case should be reversed and a new trial ordered. (*Patterson v. Oil Co.*, 101 Kan. 40, 165 Pac. 661.) In another case, where an attorney neglected to offer in evidence certain receipts which he had in his possession and which would have shown without question that a payment had been made, the judgment was set aside in order to prevent an injustice. (*Smith v. Easter*, 101 Kan. 245, 166 Pac. 510.) So here, the rights of the plaintiff, who from the evidence appears to have been an innocent holder of the paper, would have been sacrificed through the inadvertence of his attorney, and, under the circumstances showing that the trial of the case had proceeded as if the indorsement of the note had been properly pleaded, and that the proof was received without objection, we think the court should have allowed the amendment of the petition in order to conform to the proof.

The judgment is therefore reversed and the cause remanded for a new trial.

No. 21,268.

THE SEVERY STATE BANK, *Appellant*, v. THE PEOPLES STATE BANK OF CHERRYVALE, *Appellee*.

## SYLABUS BY THE COURT.

REFERENCE—*Findings of Referee—Tardy Motion for New Trial Denied—No Appeal Therefrom—Judgment.* The judgment responds to findings of fact and conclusions of law stated by a referee. The findings of fact respond to the issues made by the pleadings, and the conclusions of law merely state the legal liability arising on the findings of fact. Grounds for a new trial were not presented to the district court in time, and no appeal was taken from the order overruling the motion for a new trial which was filed. *Held*, the judgment must be affirmed.

Appeal from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed February 9, 1918. Affirmed.

A. F. Sims, of Howard, and F. S. Jackson, of Topeka, for the appellant.

Chester Stevens, of Independence, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one to recover a sum of money standing to the credit of the plaintiff on the books of the defendant. The defendant counterclaimed, and was awarded judgment. The plaintiff appeals.

The case was referred to a referee, who returned findings of fact and conclusions of law which disclose the nature of the controversy, and which follow:

"1. That the plaintiff, the Severy State Bank, is, and was, at all of the times mentioned in the pleadings and in the evidence, a banking corporation, organized and existing under and by virtue of the laws of the state of Kansas, with its bank at Severy, Greenwood county, Kansas.

"2. That the defendant, the Peoples State Bank, is, and was, during all of the times mentioned in the pleadings and in the evidence, a banking corporation, organized, existing and doing business under and by virtue of the laws of the state of Kansas, with its bank at Cherryvale, Kansas.

"3. That M. J. Bidwell was, during all of the times in which the transactions involved in this action arose, that is, from and prior to the beginning of the year 1913 to and including a part of December, 1913,

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the president and general manager of the Severy State Bank, plaintiff in this action, and during all of said time was in the active control, management and conduct of all of its business and affairs, and duly authorized by said bank to so manage, control and conduct its affairs.

"4. That during the same time, and ever since, D. W. McKinley was, has been, and now is the president of the defendant bank, and in the active control, management and conduct of its business.

"5. The defendant bank admits that it is indebted to the plaintiff bank in the sum of \$2,435.83.

"6. That in the early part of 1913 M. J. Bidwell wrote a letter to the defendant stating that the plaintiff bank was about to take some good prime cattle loans, which it would like to dispose of to the defendant bank; and that the defendant bank advised plaintiff that it would handle some of the loans, and that thereafter said defendant bank handled several loans; that from the correspondence it was justified in assuming that they were dealing with the Severy State Bank, and not with M. J. Bidwell, personally. As a matter of fact, some of the loans handled by the defendant bank at the time they were purchased by the said defendant bank, belonged to M. J. Bidwell, personally, and some belonged to the Severy State Bank.

"7. That all of these loans that were purchased by said defendant bank, either from M. J. Bidwell or the plaintiff bank, were settled, excepting two notes which are in controversy in this action. One of these notes is known as the Flaiz note; the other is known as the Edwards note.

"8. That the Flaiz note at the time it was sent to the defendant bank was the property of the plaintiff bank, and that on or about September 19, 1913, A. Flaiz, the maker of said note, delivered to said plaintiff bank two checks aggregating \$590.38, with instructions to apply them on his note; that said checks were duly cashed, but the proceeds thereof, instead of being indorsed on note as directed, were turned over to M. J. Bidwell, who appropriated it for his personal use, and that, therefore, the plaintiff is indebted to said defendant for the sum of \$590.38 with interest thereon at the rate of six per cent per annum from the 19th day of September, 1913.

"9. That the other note in controversy in this action is known as the Edwards note, and is a note dated November 1, 1913, for the sum of \$2,108.44 and signed by John Edwards; that on November 1, 1913, the said plaintiff bank accepted this note and carried it as cash item in substitution for some checks which it had been carrying as cash items for some days previous to November 1; that after carrying this note as a cash item for a day or so, it was charged to the account of the Peoples State Bank, together with a letter which stated that this was a dandy, good cattle loan and was secured by a mortgage which had been recorded. As a matter of fact, there were prior mortgages on all of the cattle reported to be covered by said mortgage, and said mortgage was never recorded, and all of the property covered by said mortgage was taken possession of by the owners of the prior mortgages; that John Edwards has no other property with which to pay this note, and that because said loan was purchased

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by the defendant bank from plaintiff bank on the assurance that it was a dandy, good cattle loan, secured by recorded mortgage, and because these representations were false, I find that the plaintiff is indebted to the defendant bank in the sum of \$2,108.44, with interest from November 11, 1913, at six per cent.

"I find as conclusions of law:

"1. That the defendant is entitled to a judgment against the plaintiff for the sum of \$598.30, the amount received by plaintiff from A. Flaiz, with interest thereon at the rate of six per cent per annum from the 19th day of September, 1913, to March 27, 1916, in the sum of \$90.53, or in sum, as principal and interest, \$688.83.

"2. That the defendant is entitled to a judgment against the plaintiff for the sum of \$2,108.44, with interest at the rate of six per cent per annum from the 11th day of November, 1913, to March 27, 1916, in the sum of \$300.99, or in the sum of principal and interest of \$2,409.43.

3. "That the aggregate judgment defendant is entitled as against the plaintiff is \$3,098.26.

"4. That the plaintiff is entitled to a credit on the judgment in favor of defendant in the sum of \$2,435.83, with interest thereon at the rate of six per cent per annum from the 19th day of February, 1914, to March 27, 1916, in the sum of \$307.71, or in the sum of principal and interest of \$2,743.54.

"5. That the final judgment should be rendered in favor of the defendant and against the plaintiff, after allowing the above credit, of \$354.72."

The plaintiff opens its argument with the following statement: "At the outset of the case it is well to consider, under the procedure taken, what is before this court for review." Consideration of the procedure taken compels the conclusion there is substantially nothing before the court for review.

The report of the referee was filed on March 27, 1916. Subsequently some errors in computation were corrected on application of the referee, which did not affect the determination of the contested issues, and which are not now material. On April 4, 1916, the plaintiff filed a motion to set aside the 6th, 8th, and 9th findings of fact and the conclusions of law. The motion is not abstracted. The defendant filed a motion for judgment pursuant to the referee's report. On November 8, 1916, the court denied the plaintiff's motion, granted the defendant's motion, and rendered judgment for the defendant. Within three days following rendition of judgment the plaintiff filed a motion for a new trial, which was overruled on December 6, 1916. The appeal was taken on January 11, 1917. The notice of appeal limited the appeal to the proceedings of November 8,

1916. No appeal was taken from the order overruling the motion for a new trial.

In the brief the claim is made that judgment should have been rendered for the plaintiff on the pleadings. No motion was made in the district court for judgment on the pleadings, and no error requiring correction by reversal of the judgment has been committed with respect to rendering judgment on the pleadings.

The motion for a new trial was not filed in time. (*Milling Co. v. Schreiber*, 102 Kan. 172, 169 Pac. 222.) No excuse for delay in filing the motion appears, and if it were necessary the presumption would be the court overruled the motion because it was not filed in time. If the motion had been granted the presumption would be the delay was excused, presumptions being indulged to uphold but not to defeat judgments. However, no appeal was taken from the order denying a new trial.

The motion to set aside findings of fact not being abstracted, the court is left in ignorance of what it contained. Assuming it contained matter similar to that embodied in one of the assignments of error, the motion was *pro tanto* a motion for a new trial, and was not filed in time. Every attack made on the findings of fact ought to have been made, and was in fact made, by motion for a new trial, the benefit of which has been waived.

The conclusions of law stated by the referee followed inevitably from the findings of fact. Additional or different conclusions of law do not appear to have been requested. So long as the findings of fact stand, the conclusions of law must stand.

Every other assignment of error raises questions which could properly be presented to the trial court only through the instrumentality of a motion for a new trial.

The plaintiff invokes the case of *Brown v. Railway Co.*, 83 Kan. 574, 112 Pac. 147. In that case all the testimony was before the court without conflict, and practically with a finding that it was all true. The referee held the testimony had no tendency to prove certain facts. The situation was the same as if the probative facts were agreed to and the only question was what ultimate inference was warranted. It was held the court could draw the inference, and there was no occasion for

a new trial. No such situation is presented here. In this instance it was necessary for the referee to choose between the testimony of different witnesses relating to material matters respecting both notes. The credibility of witnesses was involved, and probative facts tending to establish the plaintiff's theory had to be weighed against probative facts tending to establish the defendant's theory.

This opinion might well close here, but because the defendant has frankly met the plaintiff's contentions on the merits, the court has examined the merits of the controversy far enough to be satisfied the conclusions of the referee and of the district court were correct.

The major premise of the plaintiff's case is that Bidwell owned both notes when they were sent to the defendant. The plaintiff received credit for both notes. The action is brought to recover the credit, but it is claimed the transactions by which the plaintiff received the credit were personal transactions of Bidwell with the defendant, and not transactions between bank and bank. From this premise inferences of fact and conclusions of law are derived. There was convincing evidence that both notes were the property of the plaintiff when they were purchased by the defendant.

The plaintiff says that ownership of the notes was not an issue made by the pleadings, and that evidence of ownership by the bank was improperly admitted. The importance of the fact of ownership is indicated by the space in the plaintiff's briefs devoted to argument based on the contention Bidwell owned the notes. How it came into the case, whether directly or collaterally, is not very material. But the plaintiff tendered the issue in the petition. Issue was joined by the general denial of the answer, and the plaintiff itself supplied reliable evidence that it owned the notes. Ownership of the notes was a question of fact, and the plaintiff recognizes the nature of the question when it marshals evidence indicating the notes were Bidwell's notes—the fact that the notes were payable to Bidwell, conduct with respect to other notes, the rule of the banking department, the reconciliation sheet, and other evidence. The court does not propose to debate the evidence, but it may be observed the reconciliation sheet stated the truth, and did not indicate that the defendant took the

notes as Bidwell paper instead of bank paper. The notes were made payable to bearer by Bidwell's indorsement, and came to the defendant in that form. The plaintiff was not liable as guarantor or indorser, or otherwise, on the Flaiz note, and was not liable for false representations respecting that note. The Edwards note was not in existence when the reconciliation sheet was sent in.

Bidwell was the discount committee of the plaintiff, so far as it had one, and was the Severy State Bank, so far as management and control of its business were concerned. The law did not prohibit the plaintiff from acquiring title to notes which Bidwell had previously taken to himself in his private business. The regularity or irregularity of his dealings between himself as an individual and himself as the bank are not material, unless the defendant dealt with him as an individual, or had reason to believe he was using his bank for personal ends in the particular transactions involved. The evidence is quite conclusive that the defendant dealt with the plaintiff as a bank, through its president, Bidwell, and had no more knowledge or notice of his crookedness than the plaintiff's quiescent board of directors, who trusted him implicitly.

Flaiz, and the cashier of the plaintiff with whom Flaiz left checks to pay his note, gave different accounts of what took place on that occasion. Accorded a liberal interpretation, and considered in connection with other evidence, the testimony of Flaiz supports the findings of the referee. There is no doubt about the terms under which the defendant bought cattle paper of the plaintiff, including the Edwards note, and if the plaintiff, by its president, could sell the paper at all, it could bind itself, by its president, by representations respecting the character of the paper, which induced the defendant to buy.

In the motion to set aside findings, the motion for a new trial, and the assignments of error, it is charged that the findings of fact were induced by erroneous views of the law, and were contrary to law. The law contemplated is that discussed in the case of *Hier v. Miller*, 68 Kan. 258, 75 Pac. 77, and kindred cases. The charge is not supported by anything disclosed by the record. If the facts had been found as the plaintiff desired, the law referred to would have applied. The facts



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having been found otherwise, the law which the plaintiff invokes has no application.

It is not necessary to extend this *obiter* discussion of the merits further. The only proper remedy for the distress occasioned by the referee's work was by timely motion for a new trial, and appeal from the order denying a new trial.

The judgment of the district court is affirmed.

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No. 21,270.

THE UNITED STATES TIRE COMPANY, *Appellant and Appellee*,  
v. ALBERT E. KIRK and ELMER C. ASPEY, Partners doing  
business as the HUTCHINSON MOTOR CAR COMPANY, *Appel-  
lees and Appellants*.

SYLLABUS BY THE COURT.

1. **COMPROMISE AND SETTLEMENT**—*No Ground for Rescission of Settlement.* Where a settlement of an account is effected by the constructive delivery by the debtor of goods which the creditor accepts in full satisfaction of his claim, but which are left in the physical possession of the debtor and remain there for a considerable period, during which the debtor asserts and the creditor denies that such settlement has been made, the question being finally decided by an action resulting in a judgment in favor of the debtor's contention, the fact that the debtor during the pendency of the litigation disposed of a portion of the goods referred to does not amount to a rescission on his part of the contract of settlement, nor does it authorize such a rescission on the part of the creditor.
2. **SAME**—*Pleading—Cause of Action for Conversion Stated.* A petition drawn upon a theory of rescission, held to have been good against a demurrer on the ground that it states a cause of action for conversion.
3. **DAMAGES**—*Conversion—Allegations Stricken from Answer.* In an action for damages for the conversion of goods by a bailee no error is committed in striking from his answer statements amounting to reasons for the conversion, where the facts stated constitute no legal justification.
4. **SAME.** A claim for damages for malicious prosecution of a civil action held to have been properly stricken out.
5. **SAME.** In such an action as that referred to in paragraph two the defendant is entitled to set up a claim for storage charges.
6. **SAME**—*Conversion—Measure of Damages.* Although the owner of goods in the hands of a bailee denies ownership, if the holder wrongfully sells them the measure of his liability for conversion is their value at the time of sale, although a demand for them is not made until later.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed February 9, 1918. Modified and affirmed.

*W. G. Fairchild*, and *H. S. Lewis*, both of Hutchinson, for the appellant.

*F. L. Martin*, *Van M. Martin*, and *John M. Martin*, all of Hutchinson, for the appellees.

The opinion of the court was delivered by

MASON, J.: The United States Tire Company sued a partnership known as the Hutchinson Motor Car Company for the balance due upon an account. The defendants resisted the claim on the ground that a settlement had been effected by the constructive delivery in satisfaction thereof of a quantity of automobile casings and tubes. A judgment in favor of the defendants, based upon that theory, was affirmed by this court. (*Tire Co. v. Kirk*, 97 Kan. 531, 159 Pac. 392.) After that decision the plaintiff made a demand for the goods referred to, which, although constructively delivered to the plaintiff, had remained in the physical possession of the defendants, but no return was made, the defendants giving various reasons for a refusal, including claims for storage and damages. The plaintiff then brought an action asserting that by this attitude of the defendants it had been restored to the right of suing for the original balance due, and asking judgment for that amount. A demurrer to the petition was overruled. The defendants then answered, setting up a number of matters as constituting defenses, most of which were stricken out on the motion of the plaintiff, after which demurrers to the answer as a whole, and to various parts of it, were filed and overruled as to all but one count, as to which the demurrer was sustained. The plaintiff appeals from the order overruling the demurrers to the answer, and the defendants ask a reversal of the orders overruling the demurrer to the petition, striking matter from the answer, and sustaining the demurrer to one of its counts.

1. The plaintiff insists that the failure of the defendants to deliver the goods on demand amounts to a rescission of the contract by which they were to be taken in satisfaction of the debt, or that at least such conduct authorized the plaintiff to rescind the contract; or that, in any event, such refusal gave

the plaintiff the right to recover as damages, not the actual value of the goods, but the value the parties had placed upon them in the deal—that is, the amount of the debt. We do not share the plaintiff's view in this regard. As we see it, the prior litigation has resulted in an adjudication that the debt had been paid and that the title to the goods had passed to the plaintiff. The situation presents no question as to the withdrawal of a tender or the failure to make it good. The contract of settlement was fully executed; the defendants had performed their agreements. The goods belonged to the plaintiff and were subject to its disposal, although it refused to exercise ownership or to direct a disposition of them. If in that situation the defendants failed in any duty they owed the plaintiff—failed to take proper care of the goods or to hold them ready for the plaintiff as long as they should have done—their misconduct in that regard was not a breach of the contract nor a repudiation of its terms. For any such subsequent wrongful conduct of the defendants they are liable to the same extent as though the property of the plaintiff left in their hands had been derived from any other source. We agree with the trial court that the defendants were responsible merely as bailees.

2. The defendants contend that the petition is drawn exclusively on the theory that the contract of settlement had been rescinded, and on no other, and that as no facts amounting to or authorizing a rescission are pleaded no cause of action whatever is stated. It is true that the plaintiff in its pleading bases its right to recover distinctly on the proposition that there has been a rescission, and if examined in a technical spirit the petition might be demurrable on that ground. (*Gretnier v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619.) But the petition sets out the circumstances attending the transaction, from the plaintiff's standpoint, including the demand for the goods and the defendants' refusal to turn them over. The plaintiff should be given whatever relief the facts entitle him to, even if he has misconceived their legal effect (*Akin v. Davis*, 11 Kan. 580; *Chase v. Railway Co.*, 70 Kan. 546, 79 Pac. 153); by a liberal interpretation the petition may be regarded as stating a cause of action for conversion; the trial court has so construed it; that construction is ob-

viously in the interest of substantial justice and is approved. There is no allegation of the value of the goods, but this may be regarded as covered by the statement that the plaintiff had been damaged by the defendants' conduct in the sum of \$4,490.58.

The portions of the answer to which the demurrers were overruled were general and special denials, and could only have been demurrable if the specific allegations of the same pleading had been sufficient to overcome them—a condition which did not exist.

3. Of the matter stricken from the answer a part was pertinent only if the action were regarded as one upon the original indebtedness, and the ruling with respect thereto becomes immaterial because the petition is held to state no cause of action except for conversion. Another portion of the matter which was stricken out contained allegations in considerable detail to the effect that, for the purpose of minimizing the loss to the plaintiff from the deterioration of the casings and tubes through lapse of time, the defendants used a part of them in making adjustments with their customers according to guarantees made by themselves and also by the plaintiff, receiving payment therefor according to such adjustments. Whatever their motives may have been, the sale of the goods, or their use in making "adjustments," amounted to conversion, and left them liable to the plaintiff to the extent of the then value of the property with which they parted. The allegations referred to had no bearing upon the question of liability, and their exclusion from the answer was not error.

4. The remainder of the excluded matter asserted a claim for damages for the malicious prosecution of the former action and of this one. Damages are sometimes recoverable for the malicious prosecution of an ordinary civil action, even where there has been no arrest, attachment, or other special interference with person or property (*Marbourn v. Smith*, 11 Kan. 554), but only where the want of probable cause is very palpable. (26 Cyc. 16; see, also, *Emory v. Eggan*, 75 Kan. 82, 88 Pac. 740.) We think it clear that there is no substantial basis for a claim that the first action was brought maliciously and without probable cause, and no action for the malicious prosecution of the present action could lie during its pendency. (*Investment Co. v. Burdick*, 67 Kan. 329, 72 Pac. 781.)

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Drysedale v. Wetz.

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5. The count of the answer to which a demurrer was sustained set out claims against the plaintiff for storage of the goods and for services in properly caring for them, and in substance repeated the allegations with reference to using them to effect adjustments. We think the demurrer should have been overruled because of the allegation concerning storage, that being a proper basis for a charge against the plaintiff. (38 Cyc. 2102.)

6. In announcing its rulings the trial court made a statement, of which the plaintiff complains, that the measure of damages for the conversion of the goods was their value at the time a demand for them was made and refused. This statement was hardly a formal ruling—it was rather a reason given for the decision. Probably it was made with especial reference to goods that were still in the possession of the defendants when the demand was made. As to any casings and tubes which the defendants sold, or used in making “adjustments,” we think the conversion was complete at the time they parted with them, and that they are responsible to the extent of what the goods were worth at that time. (38 Cyc. 2032, note 74.)

The judgment is affirmed, with the modification that the demurrer to the allegation regarding storage charges should be overruled, and that the announcement concerning the measure of damages should not be controlling.

No. 21,272.

JAMES E. DRYSDALE, *Appellee*, v. WILLIAM WETZ, HERMAN WETZ, and FRED WETZ, *Appellants*.

SYLLABUS BY THE COURT.

1. **CONTRACT OF EMPLOYMENT—*Joint Defendants—No Different Issue Raised by Either Defendant.*** If one defendant who is sued jointly with other defendants on a contract of employment alleged to have been entered into with all of them has a different defense from the others, he should present it to the trial court in the form of a request for a special instruction, or by a demurrer to the evidence, or in some manner challenging the attention of the court to his separate defense.
2. **SAME—*Judgment against Joint Defendants.*** There being some evidence to sustain a judgment against all of the defendants, it is affirmed.

Appeal from Barber district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Affirmed.

*G. M. Martin*, of Medicine Lodge, for the appellants.

*Seward I. Field*, *J. N. Tincher*, both of Medicine Lodge, and *A. L. Noble*, of Winfield, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The action was to recover for labor and services as a farm hand, plaintiff alleging that he had been employed by defendants to work for them for a certain period, and that they had discharged him before the expiration of the term. The verdict of the jury was in plaintiff's favor, and defendants appeal.

The main contention is that there was no evidence to sustain a judgment against William Wetz, and that the court erred in submitting to the jury the question of his liability. William Wetz is the father of the other two defendants and owns the farm where plaintiff worked. The defendants appeared in both the justice and district courts by the same attorneys, and no contention was made at either trial that the employment of plaintiff was on behalf of the sons alone, or that there was not sufficient evidence to justify the court in submitting to the jury the question of the liability of William Wetz. He neither demurred to the evidence, nor asked a special instruction upon the theory that the evidence was insufficient to hold him liable; and the contention now urged seems to be based upon the fact that the evidence showed the contract of plaintiff's employment was made with the sons. The plaintiff testified that he was employed by Fred and Herman, and that he worked for the defendants, and there was some testimony tending to show that the farm was operated jointly by all the defendants. William Wetz testified that he was not present when the boys hired plaintiff, but when informed by them of the employment, he said to them that they had done a good thing.

Complaint is made of an instruction which charged that there was no dispute between the parties over the fact that they entered into a verbal contract with the plaintiff by which he agreed to perform work for them at a certain rate per

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month. No objection was made to the instruction. If one of the defendants had a different theory from the others, upon which he claimed he was not liable to plaintiff, he should have presented it to the court by a request for a special instruction, or in some other manner. Of its own motion, the court instructed that if the jury found plaintiff entitled to recover from one or more of the defendants, and not entitled to recover from all, they should return a verdict accordingly. We are unable to see that William Wetz was prejudiced by this instruction.

There being some evidence to sustain the judgment, it is affirmed.

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No. 21,274.

O. C. HARLOW and FEROL HARLOW, *Appellees*, v. C. F. PROPES (and THE AMERICAN OIL & GASOLINE COMPANY, *Appellant*).

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Substitution of Gasoline for Coal Oil—Fire in Cook Stove—Evidence.* Whether or not the plaintiff was negligent in using what he supposed to be coal oil in starting a fire in his cook stove, was a question of fact properly submitted to the jury.
2. SAME—*Agency of Oil Company—Sufficiently Established.* The agency of the seller of the fluid from the wagon was sufficiently established by the evidence of the defendant company's manager.
3. SAME—*Proximate Cause of Injury.* The substitution of gasoline for coal oil held to have been the proximate cause of the injury complained of.
4. SAME—*Motion for New Trial—Properly Denied.* The affidavit filed by the defendant Propes, even if available by the defendant company, was not sufficient to require the granting of a new trial, under the rule that such evidence must be such as would likely work a different result from that already reached by the jury.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed February 9, 1918. Affirmed.

*Frank L. Martin, Van M. Martin, and John M. Martin*, all of Hutchinson, for the appellant.

*Ray H. Tinder*, of Hutchinson, for the appellees.

The opinion of the court was delivered by

WEST, J.: The plaintiffs recovered a judgment for damages from a fire alleged to have been caused by gasoline sold to them by the defendant Propes for kerosene. The judgment against Propes was not sufficient in amount to form the basis for an appeal. The American Oil and Gasoline Company complains that the judgment against it is wrong, because the plaintiff Harlow was guilty of contributory negligence in using the supposed coal oil to start a fire with; because the finding that the driver of the wagon was an agent of the company is against the evidence; likewise the finding of negligence by the company; and because the alleged negligence of the defendants or either of them was not the proximate cause of the injury.

C. O. Harlow bought of the defendant Propes what he supposed was a gallon of coal oil, which he alleges turned out to be gasoline. In starting a fire he poured some of the fluid on the cobs he had placed for kindling in the stove, and then added a lighted match while he held the can in his hand. The jury found that he was not negligent if coal oil had been in the can. There is no question that the fluid used was both bought and sold for coal oil, and not for gasoline; and whether, under the circumstances shown by the evidence, the plaintiff's manner of starting the fire would have been negligent had the can contained coal oil, or was negligent in view of the fact that he believed that it contained coal oil, was a matter for the jury, and not one of law for the court.

The evidence of the manager of the defendant company itself was sufficient to warrant the finding as to the agency of Elliot, who sold from the company's wagon to the defendant Propes.

The finding that Propes was negligent in not testing the fluid upon complaint of another customer is said by counsel for the defendant to have stated the proximate cause of the injury. But it is also argued that Harlow's own negligence was the proximate cause. Whether the fluid had been inspected or not, if it had not been sold to Harlow for coal oil there is nothing to indicate that the injury would have re-



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sulted, and we cannot agree with the claim that there are other proximate causes thereof.

Complaint is made that the motion for new trial on the ground of newly discovered evidence was denied regardless of the affidavit of a witness to the effect that he heard Harlow say that he might possibly have got the gasoline can instead of the coal-oil can to start the fire with. Aside from the point that the affidavit, which stated that this was discovered by Propes for the first time after the verdict was returned, was filed by Propes and not by the oil company, although presented by it, the rule is that new trials for newly discovered evidence are not granted unless such evidence would likely work a different result. (*Lewis v. Shows Co.*, 98 Kan. 145, 157 Pac. 397, and cases cited.)

The judgment is affirmed.

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No. 21,275.

JOHN KURT, *Plaintiff*, v. B. A. SHUPE et al. (J. C. ELVIN, *Appellant*, J. G. KILLE, *Appellee*), *Defendants*.

SYLLABUS BY THE COURT.

NOTE AND MORTGAGE—*Foreclosure—Defense of Payment.* The evidence abstracted has been examined, and it is held that there was sufficient evidence to sustain the judgment of the court.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Affirmed.

*Donald Muir*, of Anthony, and *W. W. Schwinn*, of Wellington, for the appellant.

*James G. Washbon*, of Harper, *A. L. Noble*, of Winfield, and *J. N. Tincher*, of Medicine Lodge, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff recovered a judgment foreclosing a mortgage on real property in Harper county. That judgment is not questioned. The controversy is between the defendants J. C. Elvin and J. G. Kille. Judgment was rendered in favor of J. G. Kille and against J. C. Elvin, who appeals.

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The plaintiff's mortgage was executed by B. A. Shupe and Maude Shupe, and was given to secure the payment of a note for \$2,875. After the plaintiff's mortgage had been executed, Frank Burdg became the owner of the real property, and, on October 28, 1914, executed a mortgage thereon to J. C. Elvin for the purpose of securing the payment of \$1,208.85. On January 24, 1916, Frank Burdg and wife executed another mortgage to J. G. Kille to secure the payment of a note for \$355.24. The mortgage to Kille contained the following recital:

"This mortgage is given subject to a mortgage of \$2,875 to A. A. Kurt, and a second mortgage of \$1,208.85 in favor of J. C. Elvin."

J. G. Kille filed a cross petition in which he set up the mortgage owned by him and alleged that it was a valid and subsisting lien on the real property, subject only to the lien of the mortgage of the plaintiff, John Kurt. J. C. Elvin likewise filed a cross petition in which he set up the mortgage held by him and alleged that it was a second lien on the real property, subject only to the mortgage of the plaintiff, and superior to the mortgage held by J. G. Kille. Elvin also alleged that the note held by him had been lost. Kille filed an answer to Elvin's cross petition in which Kille denied that the note had been lost and alleged that it had been fully paid and discharged at the time the cross petition was filed. The court found for the defendant Kille, against the defendant Elvin, and rendered judgment in favor of Kille on his mortgage. The court further found that the note sued on by Elvin as a lost note had been paid; that the mortgage held by him had been satisfied by the payment of the note; and that the mortgage was no longer a lien on the real property. The court rendered judgment that Elvin take nothing by this action.

Elvin contends that there was no evidence whatever from which the court could find that the note given to him had been paid, and that no fact was brought out on the trial which justified the court in canceling Elvin's mortgage and advancing Kille's mortgage to second place.

After the mortgage by Shupe and wife had been executed, Elvin in some way became the owner of the property. Burdg bought the property from Elvin, and, in part payment therefor, gave Elvin the \$1,208.85 mortgage. Afterward, Elvin, either for himself or for Fred B. Long, repurchased the real property

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from Burdg. Burdg did not deal with Long in effecting the sale of the land; he dealt entirely with Elvin. The deed from Burdg and wife to Long was a general warranty deed, and it did not mention any mortgages.

Frank Burdg, the maker of the Elvin and Kille notes and mortgages, testified, in part, as follows:

"I paid one of these mortgages. I paid the \$1200.00 one. . . .

"I received this \$1200.00 note taken from Elvin. Nothing was said about the note except that it straightened it up. That settled all I owed Mr. Elvin. . . . I gave a chattel mortgage. It was under the same note to secure the same note. I received the chattel back from Mr. Elvin. Mr. Elvin handed it to me, and said that paid it. Paid all I owed him. . . .

"Q. And Mr. Long was to take it subject to the mortgage, was he?  
A. You mean settle this mortgage?

"Q. Yes. A. Yes, sir. . . .

"Q. Three mortgages, one \$2,875, the other \$1,208.85. . . . And those mortgages, Long was to take care of those mortgages? A. He was to take care of all but that \$355.24.

"Q. He was not to take care of it? A. No, sir.

"Q. And you were to take care of that yourself? A. No, sir, Mr. Elvin was to take care of it. I left the money there to pay it.

"Q. I say, did Elvin ever give it to you? A. He gave me the note and gave me those papers when I paid him the \$1,200.00.

"Q. Isn't this a fact, Mr. Burdg, the way the thing was done. You did n't pay anyone anything did you? A. I paid out no money.

"Q. And the agreement between you and Elvin and Long was that you were to convey the land and that Long was to take care of all your debts against the land, was n't that the agreement—let you out? A. Why, it was this way. I did not owe Long nothing. What paper I had was to Elvin.

"Q. Elvin was the go-between between you and Long? A. He was the man I made the trade with, yes, sir.

"Q. You say Jim Elvin gave you this note—where was he when he gave it to you? A. In his office.

"Q. You were going to move out of Kansas down into Oklahoma?  
A. Yes, sir.

"Q. And you wanted Swinhart to hold that mortgage against your property until you got to Oklahoma, did n't you? A. I don't know as I have to answer that. I don't think that has anything to do with it.

"By the Court: Answer the question. Do you understand the question?

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"A. No, I do not.

"Q. I asked you if you did not want Swinhart to have that mortgage assigned to him and hold it until you got moved into Oklahoma? A. Well, he did that, yes, sir.

"Q. But Swinhart did not have any interest in the chattel mortgage, did he? A. No, sir.

"Q. He did not give Elvin any money? A. No, sir.

"Q. And you requested that assignment be made to Swinhart? A. Yes, sir.

"Q. Why did you want that done? A. Sir?

"Q. Why did you want that done? A. Well, so I could have the stock.

"Q. Did you pay in any way except by the deed to Long? A. Why, that was the only way I paid it. I thought that was sufficient.

"Q. I understood you, on direct examination to say, when you got the note from Jim Elvin at Harper he said something to you about the note—about squaring that mortgage. A. Well, he said this way. He said that squared up this \$1,200 that I owed him on this chattel and on this \$1,200 mortgage that includes that chattel.

"Q. Now, when was it that you had the conversation with him about the Kille mortgage—about paying Kille? A. It was there the day that I was dealing with him on this other land, when they traded. It was mentioned at different times. One time was out at home and another time was in town—talked about it."

Burdg had possession of the note and produced it at the trial.

The evidence above detailed is sufficient to support the finding of the court that the note given to Elvin had been paid and the mortgage discharged. That is the only question presented. Argument concerning what the evidence proves or does not prove is unnecessary.

The judgment is affirmed.

No. 21,278.

THEODORE SCHAUBEL and LAURA SCHAUBEL, *Appellees*, v. THE CITY OF MANHATTAN, *Appellant*.

## SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Unguarded Excavations in City Street—Child Drowned*. When a city street which is little used for travel, and in which the children of the adjacent residents are accustomed to play, is torn up with excavations for laying a water main and lateral connections, and the excavations become filled with rain water, it is the duty of the city to exercise reasonable care to keep the children from going into the street to wade and play, and thus to prevent them from being drowned in such flooded excavations; and the question whether the city has exercised such reasonable care is ordinarily for the jury's determination.
2. SAME. A three-year-old child was drowned in a flooded ditch in a street not much used for travel, but much used as a playground for children. The parents knew of the existence of the street excavations in front of their residence, and that the excavations were filled with rain water, and that their child was in danger of drowning therein, and diligently watched their child and tried to keep her off the street, but during a few minutes when the attention of the parents was diverted to domestic duties, the child eluded their vigilance and ran out into the street to wade and play, and was drowned. *Held*, that in an action brought by the parents against the city for the wrongful death of the child, the question of the parents' contributory negligence was one for the jury's determination.
3. SAME—*Judgment Not Excessive*. A judgment for \$3,500 against a city for the wrongful death of a three-year-old child is not excessive to such an extent as to warrant its reduction by an appellate court.

Appeal from Riley district court; FRED R. SMITH, judge.  
Opinion filed February 9, 1918. Affirmed.

*Alvin R. Springer*, of Manhattan, for the appellant.

*C. B. Daughters*, of Manhattan, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: The plaintiffs recovered judgment against the city of Manhattan for the death of their three-year-old child who was drowned in a ditch in the street in front of their residence. The city had excavated a ditch the entire length of the block for the purpose of laying a water main. Lateral ditches

to the sides of the street had also been made to bring the water supply to the residence property lines. The excavations were four feet deep. The work was about completed on Monday, August 16, 1915, and the two ends of the street block were barricaded against travel. That night a heavy rain fell and a considerable portion of the vicinity drained toward this particular street and block and the ditch excavations were filled with water. The following afternoon the child ran out across the parking into the street "to wade and play" and fell into the lateral ditch in front of her home and was drowned.

The petition charged the city with negligence in allowing the ditch to remain open and unprotected and filled with water, and that the child while wading and playing in the street fell into the ditch and was drowned. It was alleged that the child was too young to know and appreciate the danger, and that her mother was busy and did not know and appreciate the danger, and that the parents used all proper care and diligence in looking after the child.

The jury returned a verdict for plaintiffs for \$4,500. Certain special questions were answered:

"First: Did either or both of the parents of Agnes Schaubel know that there were ditches in the street in front of their home, and that these ditches were filled with water prior to the time Agnes Schaubel escaped the custody of her parents and was drowned?

"Answer: Yes, but not the [particular lateral] ditch in which the child was drowned.

"Second: By the exercise of ordinary care and prudence, could the parents of Agnes Schaubel have restrained her from leaving their custody and control, and thereby have prevented her from going into the street where she was drowned?

"Answer: No.

"Third: Did the city of Manhattan have a large number of workmen at work on the ditches on Laramie street, at Fourth and Laramie and at Third and Laramie, and in the block between Third and Fourth, during the period from noon until the child was drowned?

"Answer: Testimony shows twelve men were at work.

"Fourth: If you answer the third question in the affirmative, state how near you find any of the workmen were to the place the child was drowned, at the time of the accident?

"Answer: Between seventy-five and one hundred feet.

"Fifth: Did the defendant herein, on the day of the accident have a number of men engaged at work in bailing the water out of the ditch on Laramie in the block where the Schaubels lived?

"Answer: Yes, at work in the main ditch.

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"Sixth: Do you find any negligence on the part of the city, and if so, state in what particular it was negligent?"

"Answer: Yes, because they left the ditch unguarded and exposed."

The trial court ordered a remittitur of \$1,000 and gave judgment for plaintiffs for \$3,500.

The familiar schedule of errors is assigned, but the gist of the city's complaint is the net result and the excessive verdict. Examining the errors assigned, no error can be discerned in overruling the demurrer to the petition nor in overruling the demurrer to the evidence. Nothing serious can be noted concerning the admission or exclusion of evidence, nor in the court's instructions so far as presented by the abstract of the record.

The defendant concedes that it was its duty to safeguard its streets for ordinary travel and to effectively close this street to ordinary uses while it was undergoing repairs, but it is contended that the use of a street by a child to "wade and play in" while the street was dug up with ditches for the laying of water mains was not an ordinary use of the street, and that the city was not bound to guard the street against such a use, nor could the city be required to anticipate and prevent the accident. While the street was torn up and the ditches flooded, it was the duty of the city to exercise reasonable care to keep the children off the street, the means for so doing being somewhat a matter of discretion on the part of the city. The city could and should have anticipated the danger and should have made some reasonable effort in good faith to avert it.

The foreman for the city realized the danger to children and had cautioned his workmen to keep them away. But when asked if he had seen plaintiffs' child before it was drowned he answered:

"No, No, No, I got so accustomed to seeing so many children along the street there that I didn't hardly pay any attention to who the children were. The main thing I looked out was to try to keep them out of the way."

This testimony supports the finding of the city's negligence.

The complaint as to the excessive verdict and judgment requires no discussion. The trial court pared down the verdict a thousand dollars, and the amount of the judgment finally

awarded, while large, is not so gross as to justify an appellate court in ordering its further reduction.

The judgment is affirmed.

MARSHALL, J., dissents.

DAWSON, J. (dissenting): I dissent. I take no stock in the doctrine that the city should have barricaded or otherwise guarded the sides of the street. While there may be no negligence on the part of the parents in permitting their small children to play in unfrequented streets, it would be the rank-est kind of negligence to permit their three-year-old babies to play in streets congested with traffic, and any street temporarily torn up for repairs and improvements should be considered as a congested street. It is difficult to see how the city could have kept the child off the street when the parents, who were quite alert to the danger and prompted by their natural solicitude for their offspring, failed to do so. The mother testified:

"I went out about eight o'clock in the morning and noticed that all the ditches were filled with water. I went and got the children and brought them in. . . . Before noon I spent most of the time watching the children. Went to mother's and took both children and when I came back brought them in the house. I brought them in whenever I found they had got out. I was baking in the afternoon and I had occasion to step into the bedroom for a minute and when I came back the child was gone. . . . The street on that block was little used for travel. There was a big rain Monday night. A rain about noon Monday started the water running in the gutters. We watched the children and I tried to keep them in till she slipped away. After I dressed the children that morning one went out the back way and one the front way. I brought them in, Mr. Schaubel asked why I brought them in. I said there was ditches in the street full of water, and I did not want them to get in the ditches.

"Q. Did you and your husband talk about the dangers of the children getting out there? A. Well, now I will tell you, when I got them dressed, it is natural for children to go out to play, for they do love outdoors, and one went out the back door and one out the front way. I went right after them, out the front way, and Mr. Schaubel says, 'What are you bringing them in for?' and I says, 'I am not going to have them go in those ditches and drown,' and he says, 'I am going to see those ditches'; and he walked out on the sidewalk and I did show him one in the parking. He put brush over it, and said he would put brush over that one, anyway, because it was so close to the house."



Touching the jury's second finding, it is not only contrary to the evidence but it is downright silly. The mother was successful in keeping the baby off the street in the forenoon, although it got out of doors several times and had to be brought back indoors. The parents could with diligence have been just as successful in the afternoon. They knew the child was prone to escape, and that if it did it would be in imminent danger. It should be kept in mind that this is an action by the parents, and not like that of a child for its own injuries.

Another thing: The decision in this case will do no earthly good. Not a city in Kansas will reorder its conduct on account of this decision. Does anybody suppose that because the city of Manhattan has had the misfortune to be penalized in damages for the death of a child drowned in a ditch dug in a street for the laying of water pipes, that any other city will barricade the sides of a street undergoing improvements or hire a small army of watchmen to forfend against a like mishap whenever the city is extending its water main?

I sympathize with the plaintiffs, but the law is clearly against them. (*C. K. & W. Rld. Co. v. Bockoven*, 53 Kan. 279, 289, 36 Pac. 322; *Railway Co. v. Young*, 57 Kan. 168, 172, 45 Pac. 580; *City of Chicago v. Starr, Adm'r*, 42 Ill. 174; *Reed v. Minneapolis Street Ry. Co.*, 34 Minn. 557; *Beach on Contributory Negligence*, 3d ed., § 131; 1 *Thompson on Negligence*, §§ 330-333. See, also, *Ann. Cas.* 1912 D, 526.)

I discern no negligence on the part of the city; the city could not reasonably have anticipated the flooding of the ditches and that a child would be drowned therein because of its parents' failure to keep it off the street, when the parents knew the danger and feared the very accident which transpired. The consequence is altogether too remote to justify the mulcting of the city in damages. Furthermore, I reject the doctrine to be inferred from this decision, that it is the duty of a city to make its streets at all times a safe playground for three-year-old children. But if an unfrequented street may be regarded as a playground—as a city park—then the rule announced in *Harper v. City of Topeka*, 92 Kan. 11, syl. ¶ 3, 139 Pac. 1018, should govern.

In writing the opinion of the majority, although I searched diligently, I could find no analogous case with which to fortify

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it. The only one cited by the appellee, *Gibson v. City of Huntington*, 38 W. Va. 177, does n't fit, and is of no value except as to the right of a child to play in an unfrequented street. That case does n't even tell which litigant lost or won, although I glean from its discourse that the city made a successful defense.

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No. 21,281.

C. C. EPP, *Appellant*, v. CHARLES R. HINTON et al. (CLARENCE SPOONER et al., *Appellees*).

SYLLABUS BY THE COURT.

1. ATTORNEYS' LIEN—*Enforcement—No Formal Pleadings Required.* An application to enforce a lien of attorneys upon the proceeds of a judgment obtained by their services may be made in the case wherein the judgment was rendered, without formal pleadings, as is provided in section 485 of the General Statutes of 1915.
2. SAME—*Neither Party Entitled to Jury.* Being a special statutory proceeding of an equitable nature, neither party is entitled to a trial by jury as a matter of right.
3. SAME—*Value of Legal Services—Hypothetical Questions.* A party may not complain of a ruling on an objection to a hypothetical question as to the value of legal services, which was not made when the evidence was offered.
4. SAME—*Value of Services—Expert Testimony—Personal Knowledge of Court.* While the court should give due consideration to the opinions of experts and the evidence of other witnesses as to the value of legal services, it is not controlled by such evidence, as the court itself is an expert as to the value of attorneys' services and may apply its own knowledge and professional experience in determining the value of the services rendered.
5. SAME—*Elements Entering into Value of Legal Services.* The elements entering into the value of legal services are ordinarily the character and importance of the litigation, the time and labor necessarily involved, the expense incurred in the performance of the services, the results obtained, and, where such is the agreement, that the recovery of compensation depends upon the contingency of the success achieved.
6. SAME—*Findings and Judgment Sustained.* The testimony examined, and held to be sufficient to sustain the findings and judgment of the trial court.

Appeal from Harvey district court; FRANK F. PRIGG, judge.  
Opinion filed February 9, 1918. Affirmed.

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*J. I. Sheppard, James G. Sheppard, and Kate Sheppard*, all of Fort Scott, for the appellant.

*Clarence Spooner, Ezra Branine, and Harry W. Hart*, all of Newton, *pro se*.

The opinion of the court was delivered by

JOHNSTON, C. J.: This appeal is the result of a proceeding in the trial court to determine the amount of compensation due the attorneys of the plaintiff, C. C. Epp, under their lien filed in the action. From the trial court's order awarding an attorney fee of \$4,000 plaintiff appeals.

The litigation of which this proceeding is the result began in 1910, when appellant engaged Clarence Spooner to commence a suit against the defendants, Hinton, Bane, and Gould, to rescind a contract on the ground of fraud, or in case a rescission could not be had, to recover damages in lieu thereof. The contract concerned the purchase by appellant of certain Colorado land for \$49,000. After the suit was commenced the firm of Branine & Hart, at Spooner's request and with the knowledge and consent of appellant, became associated with Spooner in the conduct of the case. At the first trial judgment was rendered in appellant's favor for \$16,108, and the defendants appealed to the supreme court (*Epp v. Hinton*, 91 Kan. 513, 138 Pac. 576; same case on rehearing, 91 Kan. 919, 139 Pac. 379), where the findings and judgment of the trial court were affirmed in every respect except that of the measure of damages; and upon that issue alone a new trial was ordered. The second trial resulted in a judgment for appellant for \$15,427.67, which was affirmed on appeal. (*Epp v. Hinton*, 98 Kan. 238, 157 Pac. 1183.)

While the second appeal was pending, Spooner, who was conducting a foreclosure action in Butler county, learned from his connection with that suit that Bane, one of the defendants herein, claimed some interest in the mortgaged land, and as a result of Spooner's management of that action Bane filed an answer in which he alleged his ownership of an interest in the land. A transcript of appellant's judgment in this action was then filed in Butler county, and an answer and cross petition was filed in his behalf in the foreclosure action, claiming a second lien on the property by virtue of the judgment filed in Butler county. The land was sold at foreclosure sale for

\$25,000, and after the satisfaction of the first lien, over \$17,000 remained to be applied on appellant's judgment, and the money was sent to the Harvey county court to be held there pending the final disposition of appellant's action then on appeal.

A notice of the attorney's lien was served on the attorneys of the defendants in 1914; a second notice was served in June, 1916; and on June 30, 1916, a copy of the motion used on July 5, 1916, in this proceeding, was served personally on appellant. The motion set forth a general outline of the litigation and the services rendered therein by the appellees. At the commencement of the proceeding, appellant moved the court that a jury be impaneled to try the facts, and the motion was denied. He also objected to the introduction of any evidence for the same reason, and on the further grounds that there were no pleadings defining the issues, and that he had not been served with sufficient notice of the proceedings.

A large amount of evidence was introduced on the hearing of the motion, much of it conflicting in character. Some of the points in controversy were: whether there was a definite contract as to compensation, or whether the matter was to remain contingent upon the outcome of the litigation; whether or not the appellees continued as the attorneys for appellant throughout the whole litigation; and what services were rendered by other attorneys engaged by appellant. It appears that prior to the second trial appellant engaged C. W. Taylor to act for him, but Taylor testified that it was upon the distinct understanding that the appellees should also remain in the case. It also appears that while appellees were looking after appellant's interests in the Butler county proceeding, the latter engaged W. A. Huxman to represent him and insisted upon his following a different course from that outlined by the appellees. In answer to a hypothetical question which was in form a complete outline of the litigation, showing the different steps taken in its course, several attorneys testified as to what would be a reasonable compensation for appellees' services, with the understanding that they took part and were personally present in all the proceedings and that their compensation was wholly contingent upon a recovery. The question was objected to by appellant for the reason that it did not specify the work done by each of the firms seeking to hold the appellant liable. The

court then stated that the record should be made to show that the appellees were seeking to recover a total sum for their joint services. It was the opinion of the witnesses that the fee should be from one-fourth to one-half of the judgment. The court heard a large amount of evidence as to the services the appellees performed, as well as those performed by other attorneys engaged by appellant, and adjudged that \$4,000 was a proper allowance.

Appellant contends that under section 279 of the civil code he was entitled to a jury trial. That section applies to ordinary actions for the recovery of money or property and not to statutory proceedings brought to determine the amount of a charging lien for services rendered by attorneys in obtaining a judgment. The appellees had given notice of their lien and had proceeded by motion, without formal pleadings, in the manner prescribed in the statute. (Gen. Stat. 1915, §§ 484, 485.) In a way, attorneys who secure a judgment are regarded as equitable assignees of the judgment, and the action of the court in the proceeding is somewhat similar to the distribution of a fund which has been brought into a court of equity in pursuance of its judgment. (*In re Gillaspie*, 190 Fed. 88; 6 C. J. 766.) The proceeding is special and summary in character, and, under the statute, a jury trial is not authorized. It is argued that if the statute is so interpreted it must be deemed to be a violation of the constitutional guaranty of the right of trial by a jury. In *Tatlow v. Bacon*, 101 Kan. 26, 165 Pac. 835, it was said:

"The constitutional guaranty that 'the right of trial by jury shall be inviolate' . . . has no application to proceedings of this character and does not extend beyond cases where such right existed at the common law, but only applies to cases that were triable by jury before the constitution was adopted." (p. 30.)

In *Swarz v. Ramala*, 63 Kan. 633, 66 Pac. 649, it was expressly held that "in chancery and in statutory proceedings the legislature has ample power to dispense with trial by jury." (p. 636.)

(See, also, *Kimball and others v. Connor et al.*, 3 Kan. 410; *In re Burrows, Petitioner*, 33 Kan. 675, 7 Pac. 148; *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031; *The State v. Linderholm*, 84 Kan. 603, 114 Pac. 857.)

It is next contended that the court erred in receiving opinions of witnesses based upon a hypothetical question which, it is argued, assumed that all of the legal services mentioned in the question had been performed by the appellees, whereas other attorneys had assisted in the litigation. The objection raised when the evidence was introduced was that it did not specify the work done by Spooner separately from that done by Branine & Hart. No reference was made to the fact that attorneys other than appellees had performed any part of the services. Even if the objection had been made that is now raised, the action of the court could not be regarded as erroneous. It is clear that the court, in determining the amount of the fee, took into consideration only the services rendered by the appellees themselves. When the evidence in question was offered and appellees had stated that they were only asking a recovery for their joint services, the court remarked: "Let the record show, as stated by the attorneys who have filed the application in this case, that they are seeking to recover the total sum for the joint service of the attorneys Clarence Spooner and the firm of Branine & Hart." In the question asked, the history of the litigation and the steps taken in the course of it, together with the results obtained, were recited, and with the understanding that the appellees took part in the proceedings from first to last, and that their compensation depended on the contingency of a recovery of a judgment, witnesses were asked what would be a reasonable fee for their services. As the litigation had been conducted before the court, with the exception of the proceeding in Butler county, and he had observed the part taken by the appellees in conducting it, he was familiar with the services rendered, for which compensation was asked. Other testimony had been introduced as well to show the work performed by appellees. The value of their services, as well as that performed by the other attorneys called into the case, was in evidence before him, and hence he was able to determine from all the evidence what compensation the appellees were entitled to have for the services actually performed by them. Even if the hypothetical question should have been made more definite in relation to the services rendered, the court was not bound by the opinion of the experts, given in answer to the question, nor by the testimony

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given by other witnesses, but could apply his own knowledge of the value of the services that had been rendered. (*Bentley v. Brown*, 37 Kan. 14, 14 Pac. 434; *Noftzger v. Moffett*, 63 Kan. 354, 65 Pac. 670; *Larabee v. Railway Co.*, 85 Kan. 214, 116 Pac. 901.)

The lowest value placed by the experts on the services rendered greatly exceeded the amount awarded to the appellees, and it is very clear from the statements of the court and the course of the trial that the allowance made by the court did not include the value of services rendered by attorneys other than appellees.

It is finally claimed that the compensation fixed is excessive. The elements which entered into the value of the legal services are: the nature and importance of the litigation, the labor and time necessarily involved therein, the expenses incurred in following the case from court to court, the results obtained, and the fact that their compensation depended upon the contingency of success. Having in view the character and importance of the litigation, the services shown to have been performed by the appellees as well as the marked success attained by them, together with the fact that compensation for the services was contingent upon the success of the litigation, the amount awarded by the court appears to be quite reasonable.

Some question is raised as to whether the fee was not fixed as the result of a conversation between Spooner and the appellant about the time the action was begun. On being asked what the cost of the litigation would probably be it was replied that it would possibly cost him from \$500 to \$1,000. There is a dispute as to the statements made at that time, but the evidence tends to show that no agreement was made between the parties as to the amount of the fee. At that time the scope and difficulties of the litigation were not apparent, and the subsequent conversations and dealings between the parties indicated that no agreement had been made as to the amount of the fee, and, also, that no compensation was to be paid except on the contingency of the success of the litigation.

The judgment is affirmed.

No. 21,285.

SARAH J. BRIGGS, as Administratrix, etc., *Appellant*, v. THE UNION PACIFIC RAILROAD COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

**ASSUMPTION OF RISK—Federal Employers' Liability Act—Death of Fireman—Falling from Moving Train.** The engineer of a freight train started the train on an interstate journey while the fireman was in a lunch room eating a lunch. The fireman came out of the lunch room, and seeing the train in motion, climbed on top of a car to go forward to his place in the engine cab. While going forward over the car tops he stumbled and fell between cars and was killed. He was an experienced and competent fireman, and knew, or should have perceived, the dangers which he would normally and necessarily encounter in passing over the train. *Held*, under the federal employers' liability act he assumed the risk.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed February 9, 1918. Affirmed.

*Joseph G. Waters, and John C. Waters*, both of Topeka, for the appellant.

*R. W. Blair, C. A. Magaw, T. M. Lillard, and A. M. Hambleton*, all of Topeka, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one for damages resulting from death of a fireman of one of the defendant's engines. A general verdict was returned for the plaintiff. With the general verdict the jury returned special findings of fact. Judgment was entered for the defendant on the findings of fact, and the plaintiff appeals.

The deceased was fireman of an engine drawing an east-bound interstate train. Near midnight the train reached Topeka, and the engineer stopped the engine about fifty feet west of Kansas avenue, a street adjoining the defendant's depot on the west. The engineer and fireman left the engine and went to a lunch room some ninety feet east of Kansas avenue, where each one ordered a lunch. When the engineer had finished his lunch he left the lunch room, went to his engine, and put the



train in motion. The train moved the distance to the lunch room quite slowly, the speed being not more than two miles per hour when the lunch room was passed. After that the speed was increased to about seven miles per hour, but it was necessary to stop for the crossing of the Santa Fe railroad, about thirty-five car lengths away, and the engine did stop from twenty to twenty-five car lengths from the lunch room. The engineer whistled for the Santa Fe crossing, and again put the train in motion. He testified that he expected the fireman to catch the side of a car, ride to the Santa Fe crossing, and then come into the engine from the ground, or else come over the tops of the cars to the engine, according to a general practice followed for the fourteen years he had been working on the defendant's road. About the time the engine was over the Santa Fe crossing the engineer received a stop signal, stopped the train, and was informed the fireman had been killed. The fireman had come out of the lunch room, and seeing the train in motion, had climbed upon it, and while going over the tops of the cars toward the engine, had stumbled and fallen between cars. There was evidence that before going to the lunch room the engineer told the fireman there was time for lunch, but they would need to hurry, and that before leaving the lunch room the engineer said to the fireman, "Let's go." In response to this suggestion, or command, of his superior, the fireman made a jovial remark. An ex-engineer, without a regular run since 1906, testified that it was the fireman's duty to be in the cab before the train started, but he further testified that the engineer must wait until the fireman comes, and has no business to start his engine until the fireman is in the cab. The findings of fact, which, as the case is presented, establish all the facts which are material, follow:

"No. 1. Did Kyle, the engineer of the train, start the train on its journey without Briggs, the fireman, being in the cab, and without said engineer knowing where Briggs was? Answer: Yes.

"No. 2. Did Briggs come out of the lunch room, and seeing his train moving to the front, get upon the train and go to the front of the cab, and while so doing did he not stumble and fall between the cars and was killed? Answer: Yes.

"No. 3. Was it the duty of Briggs as fireman to get upon the train and go over the car tops that he might regain his place in the cab? Answer: Yes.

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"No. 4. Was the engineer negligent in starting his train without fireman being in the cab of the engine? Answer: Yes.

"No. 5. Did not the act of the engineer in starting his train without Briggs being in the cab make it necessary for Briggs, in the discharge of his duty, to get upon the moving train and go over it to his place of duty? Answer: Yes.

"No. 6. Would the death of Briggs have happened if the engineer had not started the train until Briggs was in the cab? Answer: No.

"No. 1. Was Earl H. Briggs at the time of his death an experienced and competent fireman? Answer: Yes.

"No. 2. Did Earl H. Briggs know, or in the use of ordinary care should have known, the risks and dangers which he would normally and necessarily encounter in passing over the train from which he stumbled and fell? Answer: Yes.

No. 3. If Earl H. Briggs had not stumbled would he have fallen from the train? Answer: We don't know.

"No. 4. Was the defendant guilty of any negligence toward Earl H. Briggs? Answer: Yes.

"No. 5. If you answer the last question Yes, then state fully of what such negligence consisted. Answer: Starting his train without his fireman."

The district court held that findings 1 and 2 of the second series established the pleaded defense of assumed risk.

The action was prosecuted under the federal employers' liability act, and must be determined by the federal law, as interpreted by the federal court of last resort. The case upon which the plaintiff relies for recovery (*Ches. & Ohio Ry. v. De Atley*, 241 U. S. 310) illustrates as well as any which might be chosen the views of the supreme court of the United States respecting the subject of assumed risk under the federal employers' liability act. The head brakeman of a train was sent forward to obtain some necessary information. The train followed him, and it was his duty to board it while it was in motion. It was the engineer's duty to operate the train at such speed the brakeman could board it without undue peril, and the brakeman had a right to assume that it was so operated. While the train was moving at the rate of twelve miles per hour the brakeman attempted to board it, was unsuccessful, and was injured. The case was treated as one presenting the question of assumed risk.

"Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have

anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive and appreciated the extraordinary danger, or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them." (p. 317.)

The court of appeals of the state of Kentucky had held that the brakeman had not assumed the risk of injury, because his situation and opportunities for observation were such that he could not judge the speed of the train. Upon this subject the opinion reads:

"The court of appeals reasoned that plaintiff's duties required him to be upon the passing train; that if he failed to board it he would be left behind; that he had a right to assume the engineer would run the train at a speed that would enable him to get on in safety; that he was facing the train, which was going directly toward him; that, as a matter of common knowledge, one standing in that position cannot form an accurate judgment of its speed until it comes quite near to him; and that his opportunity to observe the speed was limited to the brief space of time that elapsed between the passing of the front end of the engine and the cab, where it was his purpose to get on; and the court determined that, under such circumstances, 'it is well-nigh impossible to tell the difference between a rate of from four to six miles an hour, when an ordinarily prudent brakeman might get on with reasonable safety, and a rate of from ten to twelve miles an hour, when it would be dangerous for him to do so,' and that 'all the circumstances tend to show that knowledge of the speed of the train came to him so suddenly and unexpectedly that he did not have an opportunity to realize and appreciate the danger of getting on.' Conceding the force of the reasoning, we are bound to say that, in our opinion, it cannot be said, as matter of law, to be so incontrovertible that reasonable minds might not differ about the conclusion that should be reached. We therefore hold that the question of assumption of risk was one proper for submission to the jury. . . ." (p. 317.)

In the case under decision the jury have found specifically that the fireman did know, or that ordinary prudence would have perceived, the dangers normally incident to passing over the train from which he fell.

In the De Atley case it was held that the federal employers' liability act abrogated the fellow-servant rule, but in other respects left unimpaired the common-law defense of assumed

risk, except in cases covered by some statute enacted for the safety of employees. The risks assumed are the ordinary risks incident to the employment. Those risks, however, are not all that may be assumed. Extraordinary risks created by negligence of the employer may be assumed, if the employee be aware of them, or if they are so obvious that any reasonable person would be aware of them and appreciate them.

"According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents had exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." (p. 315.)

This rule was applied to the facts of the De Atley case in the following manner (*italics added*) :

"Plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, *until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other.*" (p. 314.)

In the De Atley case the negligence which created an extraordinary hazard was the negligence of the engineer in operating the train at too great a rate of speed. In this case the negligence which created the extraordinary hazard consisted in starting the train before the fireman was in his place (findings 4 and 5, second series). There was no allegation, no proof, and no finding that the train was operated at too great a rate of speed, or that the speed of the train was negligently increased, or that the cars were jerked or bumped, or that any negligence whatever, of omission or commission, occurred after the train was started. The danger, therefore, was the normal danger attending the way which the fireman chose of reaching his place on the engine of the moving train. This danger was perfectly obvious to any one.

The fireman had a right to assume that the engine would not be started until he was in the engine cab. It was started, however, without him. When he came out of the lunch room

the engine and a number of cars had already gone by, and the train was going forward. He was immediately and manifestly confronted with all the difficulties and dangers to be encountered in reaching his place on the engine. It would be fatuous to say he was not aware of them, and it would be an impeachment of the mental capacity of a competent man to say he did not appreciate them.

The plaintiff says the time was nighttime. It was a night train, and no one was better aware of the darkness than the fireman. The plaintiff says there was smoke. The record does not so show, but if there were smoke, it was a normal incident to the operation of a freight engine. The whole situation created by the engineer's negligence lay before the open eyes of this experienced trainman the moment he stepped out of the lunch room. He voluntarily chose his course, and voluntarily assumed the risk attending his choice.

In order that the decision may not be misapplied in other cases, the court deems it proper to say that if the action were prosecuted under state instead of federal law, the court would not consider assumed risk to be involved unless the jury were to find, either by general verdict under proper instructions, or by special finding, that starting the train without the fireman had become such a general practice that the fireman might have anticipated it in this instance. In this state assumed risk is a matter of contract, and not a matter of prudence of conduct. Only those risks are assumed which naturally and normally attend the employment. Extraordinary risks, created by sporadic acts of negligence on the part of the employer, are not assumed. When an employee has been confronted by such a risk, has acted, and has been injured, the question is whether or not his conduct was, under all the circumstances, reasonably prudent—that is, the question is one of contributory negligence. Assuming in this instance that starting the engine without the fireman was a common practice, the practice was one of the conditions of the employment, and the fireman assumed the risk if he continued to work without protest against it, or if he continued to work after unavailing protest. Assuming, however, that starting the engine without the fireman was an unusual occurrence, the question was whether or not a person of the fireman's qualifications and experience,

and resting under his duty to reach his engine, might, under all the circumstances, with reasonable prudence attempt to do so by going over the tops of the cars. The question would be a jury question, and if the fireman were found to be negligent, the fact of contributory negligence on his part would not of necessity entirely defeat recovery. The case being governed by federal law, the court has applied that law, as expounded by the supreme court of the United States.

The judgment of the district court is affirmed.

No. 21,286.

GLADYS PRICE STAHL, *Appellee*, v. JAMES HENRY STEVENSON  
et al., *Appellants*.

SYLLABUS BY THE COURT.

1. ORAL PROMISE—*To Leave Share of Property to Heir—Not Within Statute of Frauds.* A promise of an ancestor that he will at his death leave to an heir presumptive the share of his estate to which such heir, in the event of his then dying intestate, would be entitled under the statutes of descents and distributions, is not a contract for the sale of an interest in lands within the meaning of the statute of frauds, notwithstanding the ownership of real estate by the ancestor when the promise was made and at the time of his death.
2. SAME—*Capable of Performance Within a Year.* Such a contract is not one that is not to be performed within a year, within the meaning of the statute of frauds.
3. SAME—*To Leave Property to Heir—Consideration Release of Interest in Life Insurance—Specific Performance.* The holder of a life insurance policy in which his wife, who had since died, was named as beneficiary, desired to collect its surrender value, and for this purpose was required by the insurance company to obtain a release from her heirs. To induce the daughter of a deceased son to sign such release, he promised that if she would do so she should receive at his death one-third of his estate, which was the share she would have inherited had he then died intestate. She accepted the proposition and signed the release. He died leaving a will which had been executed before the transactions referred to, giving the entire estate to others. *Held*, in an action by the granddaughter of the testator against the beneficiaries under the will to recover a third of the estate, that whether or not the plaintiff's signature was necessary to give her grandfather a valid claim against the company for the whole value of the policy, her affixing it to the release at his request was a sufficient consideration to support a contract, and notwithstanding that

any possible interest she had in the insurance policy was trivial in comparison with the value of the property she claimed, it cannot be said (in view of the fact that what her grandfather promised her was what she would have received had he made no will, and that her controversy is not with him, but with those whose claims are based on her disinheritance) that a court of equity should refuse to enforce the contract as against good conscience.

4. *SAME—Rejected Evidence—Nonprejudicial.* Rejected evidence held not to have been of sufficient importance to warrant a reversal, assuming that it should have been admitted.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed February 9, 1918. Affirmed.

*Frank L. Martin, C. M. Williams*, both of Hutchinson, and *L. S. Ferry*, of Topeka, for the appellants; *Van M. Martin*, and *John M. Martin*, both of Hutchinson, of counsel.

*A. C. Malloy*, and *F. Dumont Smith*, both of Hutchinson, for the appellee.

The opinion of the court was delivered by

MASON, J.: John R. Price died on February 24, 1913, at the age of eighty-two, leaving a will dated July 21, 1910, by which a life interest in all his property was given to his two daughters, Jane Price Stevenson and Cordelia Price Stevenson, and the fee to the children of one of them. Gladys Price Stahl, the only surviving child of a deceased son of the testator, brought an action against the beneficiaries to recover one-third of the estate, on the ground that in 1912 her grandfather had promised that she should have it, the promise being founded upon a valuable and sufficient consideration. She recovered a judgment, from which the defendants appeal.

1. The promise referred to was not in writing, and the defendants urge that it is rendered unenforceable by the clause of the statute of frauds requiring written evidence of contracts for the sale of lands, or any interest therein. (Gen. Stat. 1915, § 4889.) A contract to devise specific real estate, or to leave by will specific property, a part of which is real estate, is within this provision of the statute. (*Nelson v. Schoonover*, 89 Kan. 388, 391, 131 Pac. 147, and notes therein referred to; *Browne on Statute of Frauds*, 5th ed., § 263; 20 Cyc. 235.) The text last cited concludes with the statement: "However,

an oral agreement that part of one's property shall go to the promisee, which does not specify what property or its nature, will support an action." Five cases are appended in a note, but in none of them is a decision reached which is directly in point. In the first one the contract involved was that of a father to give to a daughter (at once and not by will) such a sum as would place her on equal footing with his other children; it was held to be too indefinite for enforcement, but a dictum was added to the effect that the agreement was not one for the conveyance of real estate. (*Adams and Wife v. Adams*, 26 Ala. 272.) The second case (*Lee, Adm'r, v. Carter*, 52 Ind. 342) involved a promise to devise a tract of land. It turned upon part performance; the statute of frauds discussed was that relating to contracts not to be performed within a year; and the opinion was qualified by a later decision. (*Wallace, Administrator, v. Long, Guardian*, 105 Ind. 522.) In the third case the agreement was in writing, but was said to have been enforceable if it had been oral. (*Sutton et al. v. Hayden et al.*, 62 Mo. 101.) In the fourth an oral contract for mutual wills was upheld on the ground that the promisor sought to be charged had only personal property—no real estate—at the time of her death. (*Turnipseed v. Sirrine*, 57 S. C. 559.) In the fifth case it was said that the question whether the parol contract involved was one for a sale of land did not arise. (*Quinn v. Quinn*, 5 S. D. 328.) The plaintiff was the adopted son of a testator, and claimed a share of the estate under an agreement that he was to inherit a just and full part of it. The court used this language, which shows a situation quite analogous to that here presented: "The plaintiff does not seek to establish his right to inherit the estate of said Quinn, or his portion thereof, by a parol contract, but to show that Quinn had agreed not to deprive him of his rights as heir under the order of the court; not that Quinn should convey or will property to him, but that he would not deprive the plaintiff of his right as heir under the legal proceedings. The contract, therefore, set out in plaintiff's complaint, is not one relating to the sale of land, or of an interest therein, in the sense that such a contract is used in the statute." (p. 334.)

Two additional cases are cited in 1913 Cyc. Annotations p. 2256. But in one of them the promisor had no real estate



either when he made the agreement or at the time of his death (*Hull v. Thoms*, 82 Conn. 647), and in the other the decision turned upon part performance. (*Dalby v. Maxfield*, 244 Ill. 214.)

It seems to this court that there is just ground for a distinction, with respect to the applicability of the statute of frauds, between an agreement by the owner of real estate to devise it to a particular person, and an agreement that at his death he will leave to such person a certain proportion of his estate, of whatever it may happen to consist. The former necessarily has to do with the transfer of realty; the latter has no necessary connection with any specific property. The circumstance that when the promise is made the promisor happens to own some real estate, to which no reference is made, does not seem a suitable test of the enforceability of the contract; and the question whether or not his assets, which may have been continually shifted from one form to another, chance to include some realty at the time of his death, appears to furnish even a less satisfactory criterion. But perhaps that matter in its general aspect need not be determined, because of the special features of this particular case. At the time John R. Price is found to have made the agreement sued upon, his sole heirs presumptive were his two daughters and the plaintiff, each of whom would have received, in the event of his death intestate, one-third of his estate. The agreement of the plaintiff's grandfather was essentially negative. His promise was not necessarily that he would make a will in her favor, but that he would not disinherit her, or reduce the proportion of the estate to which she would be entitled as an heir—that her interest to that extent should be protected in any will he might make. We do not regard this as a contract for the sale of an interest in lands within the meaning of the statute of frauds, notwithstanding the ownership of real estate by the grandfather both at the time of making the promise and at the time of his death. No specific property was within the contemplation of the parties. The agreement was quite analogous, so far as relates to the statute of frauds, to a promise to include in a will a legacy for a fixed sum, or for an amount equal to a fixed proportion of the estate. If her grandfather had made a will ordering

the sale of the property and the payment to the plaintiff of one-third of the proceeds in excess of his indebtedness and the expenses of administration, that might have been regarded a substantial compliance with the contract. While the action is for the recovery of a third of the specific property left by plaintiff's grandfather, that results from an incidental and not an essential feature of the arrangement. Upon these considerations we conclude that the agreement relied upon was not one for the sale of an interest in lands, and was not within the part of the statute of frauds relating thereto.

2. A contract of the character here involved is not an "agreement that is not to be performed within the space of one year from the making thereof," within the meaning of that phrase as used in the statute of frauds. (20 Cyc. 201; Note, 4 Ann. Cas. 174.) By the death of the plaintiff's grandfather within a year it might have been fully performed within that time; there was no stipulation to the contrary; and that clause of the statute does not apply. (*A. T. & S. F. Rld. Co. v. English*, 38 Kan. 110, 117, 16 Pac. 82.)

3. The defendants assert that the evidence does not support the finding that the contract relied upon was made. There was evidence tending to show these facts: John R. Price had a life insurance policy issued in 1873, in which his wife, Margaret J. Price, was named as beneficiary. The policy appears to have been lost. The wife of the insured having died, he wished to obtain the surrender value, \$2,142.40. The insurance company was not willing to make payment without the authorization of all the heirs of Margaret J. Price. A release was prepared, acknowledging the receipt of the amount, and authorizing it to be paid to John R. Price. The signing of this instrument by the plaintiff is the consideration relied upon by her for the promise sued upon. Her mother testified that John R. Price said to her: "You tell her [the plaintiff] to sign this paper, it isn't very much. You tell her to sign it and she will have her third of everything I have, just the same as if her father was living. She will get her father's share; you tell her so." The witness added that he said this over and over; that "it was on condition that she would sign the paper." The plaintiff testified that this was communicated to her and that she signed the paper because of her grandfather's promise.

There was other evidence bearing on the matter, but we regard this as sufficient to uphold the finding that the contract was made.

The defendants urge that the consideration was insufficient. We regard it as legally capable of forming the basis of a contract. The plaintiff was under no obligation to sign the instrument, and whatever the actual rights of the insured may have been as against the company, and whether or not the plaintiff had any interest whatever in the policy or its proceeds, her signature enabled him to realize upon it without controversy or litigation, and an agreement to pay for the accommodation was not rendered nonenforceable by the want of a valid consideration. The situation in this regard is analogous to that presented where an act which one is under a legal obligation to perform is made a sufficient consideration for an agreement by the existence of a controversy on the subject. (*Odrowski v. Swift & Co.*, 99 Kan. 163, 162 Pac. 268.) The defendants question the existence of any evidence that a claim was made by the insurance company that John R. Price was not entitled to the money. There was evidence that he asserted that the policy was payable to him when he attained the age of eighty years, and the company conceded that this would be true when he was eighty-five; that the policy was lost and the company had no copy of it or other evidence of its contents, and refused to pay it without the execution of the release. We think this sufficiently shows the existence of a dispute as to the rights of the parties under the policy. The trial court, in a statement of the reasons for the decision, referred to the requirement of the company as calling for a release by the heirs of the insured. This is criticised on the ground that the requirement was for a release by the heirs of the person named as beneficiary. The inaccuracy does not appear to be important. The same persons were indicated, whichever phrase was used. It was admitted that John R. Price conceded that it would be easier to get a release from them than to have any further controversy about it. The exact contents of the policy are not established, and the actual legal rights of the parties are therefore uncertain.

A more serious attack upon the consideration, however, concerns its adequacy to support an action in the nature of

one for the specific performance of the contract. The defendants invoke the rule that the granting of specific performance lies to a considerable extent in the discretion of the court, and argue that it would be inequitable to allow a recovery here because thereby the plaintiff would obtain a third interest in an estate said to be worth \$50,000, in consideration of her having signed a relinquishment to a claim amounting in all to but little over \$2,000, in which she had no more than a one-sixth interest, if she had any. Stated in this way the disproportion between what the plaintiff parted with and what she seeks to recover in return for it seems very striking. But against this several considerations are to be noted. The act of the plaintiff in signing the release presumably gave her grandfather the immediate possession of the entire amount, which may have been a matter of great importance to him. And what he promised her in return was not to give her any part of the property which he then possessed, but to see that at his death she should receive one-third of his then estate, which might be of equal or greater value, but which also might be very much less. Moreover, the share promised her was just what the law would have given her had he then died intestate, and what in all probability she would sometime receive unless he should see fit to disinherit her or diminish by will the share which would come to her, in case of his intestacy. The evidence indicated that there had previously been something of an estrangement between the plaintiff and her grandfather, and the arrangement entered into between them had something of the aspect of a reconciliation. In view of the circumstances and the relations of the parties, we do not think it can be said that the agreement between them was unconscionable and that a court of equity on that account should refuse to enforce it.

Nor can the contract be regarded as an unjust infringement on the rights of the defendants. Until the death of John R. Price they had no interest in the property. Anything they should collectively receive in excess of two-thirds of the estate would be in virtue of his favoritism towards them. There was no inequity towards them in his agreeing that the plaintiff should receive the part of the estate which would come to her by operation of law unless he should prevent it by affirmative

action, however insignificant may have been the personal benefit which he received in return for such agreement.

In the Kansas case most strongly relied upon as authority for refusing the enforcement of this contract it was said:

"While inadequacy of price is not sufficient of itself to avoid a decree for performance, it is a circumstance which will be taken into consideration with all the facts in determining whether a court of equity is called upon to afford relief. . . . The doctrine is well established that before a court of equity will enforce performance of a contract of this kind it must appear to have been fairly entered into without any sort of advantage or imposition—must, in other words, appeal to the conscience of the court and compel its discretion." (*Shoop v. Burnside*, 78 Kan. 871, 876, 877, 98 Pac. 202.)

We do not discover anything in the facts of the present case that suggests overreaching or imposition. The proposition on which the contract was based, according to the evidence, came from the plaintiff's grandfather and was urged upon her somewhat strongly. She appears to have been entirely ignorant as to what rights she might have in the policy, and so far as the record shows may have been equally ignorant as to what the value of her grandfather's estate might be. She had no previous connection with the matter and was under no obligation with respect to it. In these respects the situation is obviously very different from that presented in *Kelley v. Caplice*, 23 Kan. 474, and *Caplice v. Kelley*, 27 Kan. 359, where one who had sold an insurance policy was denied the benefit of an unconscionable bargain she had driven by refusing to sign a release necessary to the effectiveness of the sale until she had been promised a large part of the proceeds of the policy for so doing. We approve the ruling of the trial court allowing the enforcement of the plaintiff's contract.

4. Several of the defendants offered to testify that John R. Price had made statements to them to the effect that he had given the plaintiff's father so much financial aid that he felt under no obligation to provide for her in his will. The offer was rejected by reason of the statute relating to testimony concerning transactions with persons since deceased. (Gen. Stat. 1915, § 7222.) Complaint is made of the ruling on the ground that the plaintiff, by introducing portions of depositions of the witnesses, had waived the objection. We do not discover that the evidence introduced by the plaintiff bore

upon the transactions covered by the rejected testimony. In a subsequent brief it is suggested that the evidence of one of the witnesses covered statements made to another person, and should have been admitted on this ground. That feature of the matter does not appear to have been presented to the trial court, and therefore is not available here. It is contended that as to one of the witnesses the statutory rule did not apply because, although made a defendant, his only interest in the matter arose from his being the husband of one of the devisees. That in itself is not a disqualification. (*Cadwalader v. Pyle*, 95 Kan. 337, 148 Pac. 655.) However, the court stated that the testimony would be admitted if the witness would disclaim interest, and he declined to do so, saying that the offer was made in behalf of the other defendants, not of himself. Assuming that the evidence should have been received, we do not think it of sufficient importance to justify a reversal. The affidavit of the witness which was presented at the new trial contained a statement that John R. Price had promised his daughters to leave all his property to them in consideration of services they had rendered in caring for him. It is contended that this should have been received as showing a contractual right to the property. That was not an issue in the case, not having been pleaded. The daughters of the testator after his death obtained a decree to certain real estate, on the ground that he had promised it to them, but the claim that they had been promised the entire property was not made in the answer. The affidavit also set out that John R. Price had complained of ill treatment by the plaintiff and her mother, and stated that he had lost money through her father, and for this reason, and because her mother had plenty of money and would naturally provide for her, he was going to leave what little he had left to his two daughters and the children of one of them. This may have had some bearing on the attitude of her grandfather toward the plaintiff. But the fact that he had said that he had lost money through her father was brought out by other witnesses, and his will recited that on account of what he had done for her theretofore he did not consider that she had any further claim upon his bounty. In view of this the rejected evidence does not appear sufficiently vital to require the setting aside of the judgment.

The judgment is affirmed.

No. 21,287.

A. J. VOGLER, *Appellee*, v. J. D. BOWERSOCK, doing business as the LAWRENCE PAPER MANUFACTURING COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. **COMPENSATION ACT—*Validity of Release—Trial by Jury.*** Section 5930 of the General Statutes of 1915 (Workmen's Compensation Act, § 36), construed, and *held*, that in actions to enforce compensation where the validity of a release or other discharge of liability is involved, either party may, when the case is called for trial, demand a trial of that issue by a jury.
2. **SAME—*Release Set Aside—Sufficiency of Evidence.*** Evidence examined, and *held* sufficient to sustain a judgment setting aside a release executed by the plaintiff purporting to discharge the defendant from liability for compensation.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed February 9, 1918. Affirmed.

S. D. Bishop, of Lawrence, and O. L. Rider, of St. Louis, Mo., for the appellant.

John J. Riling, and Edward T. Riling, both of Lawrence, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The defendant appeals from a judgment in plaintiff's favor under the workmen's compensation act.

Mr. Bowersock, the defendant, is the owner of a paper mill in which the plaintiff, while employed at a corrugating machine, was injured, his left hand being drawn into the rollers and crushed, resulting in the loss of the hand, with the exception of the thumb. The accident occurred in May, 1914. The answer pleaded as a defense a settlement and release on the 9th of September, 1914, in consideration of the payment to plaintiff of \$500. The instrument of release was acknowledged before a notary public and filed in the office of the clerk of the district court. In his reply the plaintiff alleged that while he was in the defendant's employ an arrangement was entered into by which defendant deducted the sum of five cents for each \$5 or major portion thereof earned by plaintiff, which sums, together with the similar deductions from the wages

of all the employees, were paid for the purpose of obtaining workmen's collective insurance; and that the release was obtained by the agent of the insurance company carrying the collective insurance, who did not disclose to plaintiff the fact that he was acting as the agent of Mr. Bowersock, but claimed to be the representative of the insurance company; and that plaintiff accepted the \$500 in settlement of his claim for insurance, and not in payment of compensation from defendant. The reply alleged that the agent of the insurance company falsely and fraudulently represented to the plaintiff that the instrument he was signing was only a receipt for his claim against the collective insurance, and that he signed it relying upon and believing the representations, without knowing that the agent claimed to or did represent the defendant. The plaintiff also alleged that he is a man of little education, and was induced by the statements and representations of the agent of the insurance company to sign the instrument without reading it or having it read to him.

When the case was called for trial, the defendant insisted that the issue of fraud be tried before the court without a jury, and urges error in denying his request. He relies upon provisions in the workmen's compensation act (Gen. Stat. 1915, §§ 5917, 5921-5923, 5930) which authorize settlements by agreement, and which provide for the form of such agreements and their acknowledgment; for filing them for record with the clerk of the district court, and for cancellation of any agreement within one year thereafter by the judge of the district court, upon the application of either party, in cases where the agreement or award has been obtained by fraud or undue influence; and especially upon the provisions of section 5930, which declares that the workman's right to compensation—

"may, in default of agreement or arbitration, be determined and enforced by action in any court of competent jurisdiction. In every such action the right to trial by jury shall be deemed waived and the case tried by the court without a jury, unless either party, with his notice of trial, or when the case is placed upon the calendar—demand a jury trial."

It should be noted in this connection, however, that the same section contains the following provision:

"An action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation under this act."



While it is obvious that the compensation act was made up of sections taken from similar acts in other states, and while we have no provision in our practice for having a cause "noticed for trial," we think the provision for waiving a trial by jury should be construed to mean that when the case is called for trial, if neither party demand a jury, the right to a jury trial is deemed waived, and the case is then to be tried by the court.

The record contains no reference to any demand by plaintiff for a jury, but presumably when the case was called for trial the court was engaged in the trial of jury cases. The abstract recites that the case came regularly on for trial before the judge and a jury, and thereupon, before the jury was impaneled, counsel for defendant objected "to a trial . . . at this time for the reason that the pleadings disclose the fact that a contract of settlement has been entered into between the plaintiff and the defendant, and that if this cause is triable at all, it is by the judge." The court then stated its reasons for holding the cause triable by a jury. The plaintiff appeared to be ready for trial and, although he made no demand for a jury, his attitude we must construe as being opposed to that taken by counsel for the defendant. Besides, it would be a useless proceeding to reverse the judgment and send the cause back for another trial, because the plaintiff could make a formal demand for a jury and thus prevent defendant from trying the case before the court.

The main contention is that plaintiff failed to sustain the burden of proof and show that the release was obtained by fraud or misrepresentation. Upon this issue the evidence was in direct conflict, but it was a pure question of fact. Moreover, the trial court heard and saw the witnesses and has approved the verdict; it comes to us sanctioned with that approval, and we are bound by it. The most that can be said is that the evidence was sufficient to sustain a verdict either way on the issue of fraud. There were a number of circumstances which told strongly against the plaintiff's contention that it was obtained by fraud or misrepresentation. He was not laboring under any sickness or mental disability; his injuries were received on the 20th of May, 1914, and the release was not executed until the 9th of September. After receiving the

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payment of the \$500, he made no further claim against the defendant for compensation, although he had been paid partial wages for a portion of the time prior to the settlement; and he never consulted an attorney about a claim for compensation until the middle of the summer of 1915. This action was not brought until December, 1915, more than a year after he was paid the \$500. At the trial it was shown that his contention that he was unable to read was unfounded. He could read and he could write; and this was demonstrated before the jury. He was able to read the release, but claimed not to understand the meaning of the words "original," "compromise," "employer," "disagreement," "settlement" and "sum." Written reports were produced which had been made out by him, showing the character and quantities of work turned out while he was operating the corrugating machine. There was no evidence tending to show that any attempt was made to prevent him from reading the paper before he signed it.

On the other hand, there were circumstances which tended to support his contention that he signed the release without knowing that it was for any claim except collective insurance. The same insurance company which indemnified the defendant for liability under the compensation act, and whose agent procured the release, carried the workmen's collective insurance under a policy issued likewise to Mr. Bowersock, but paid for by deductions from the workmen's wages. The plaintiff had been injured once or twice before, and the same insurance company, through Charlton, the local agent, had settled with him for his insurance. When plaintiff went to the doctor's office to see the agents they offered him \$300. His testimony is that he insisted he was entitled to \$750, and that he had a paper at home which would show this fact, and he asked the agent what the company did with the sums deducted from the wages of the workmen, since they did not seem willing to pay him what was right. He and Doctor Phillips went to his home and brought back the paper, which contained instructions to employees in regard to their collective insurance and provisions as to the amount to be paid for various injuries. It contains a statement that plaintiff would be entitled to recover \$750 for certain injuries, and its introduction in evidence tended in some measure to sustain plaintiff's contention

that he thought he was settling with the agents of the insurance company for his collective insurance.

The instrument does not contain the name of Mr. Bowersock, but refers to him as "employer." It recites that "the said employer, in compromise settlement of all liability on account of said injury, has paid to me the sum of five hundred dollars (\$500.00) in full satisfaction of all rights of action and claims of injury on my part by reason of the said injury"; and that plaintiff released his employer "from any and all and every liability, . . . from all claims, legal or equitable, suits, actions, causes of action or proceedings for the recovery of compensation, under statute or otherwise, for damages or compensation for or on account of the said injury above referred to, either to my person or property."

No reference is made to insurance, collective or otherwise; the insurance company is not mentioned, and yet that company, through whose representative the release was procured, still claims, as shown by its correspondence with plaintiff's attorney, that the instrument was intended to and does cover, not only the claim against Mr. Bowersock under the statute, but also plaintiff's claim for collective insurance, and that the \$500 paid to the plaintiff satisfied both claims. Usually in cases of this kind the defense is conducted by the surety company in the name of the employer. Whether it did so in this instance does not appear from the record. If the release in question was intended to include the settlement of plaintiff's claim for collective insurance, it should have contained a recital to that effect; and it would seem that by the omission of many legal and technical terms and useless repetitions there would have been room for some reference to collective insurance, without increasing the length of the instrument. The fact that the insurance company, which is an interested party, makes this claim in the face of the omission of any such recitals in the release shows that the instrument does not express all that was intended, and indicates that the subject of collective insurance must have been discussed in the settlement. The verdict of the jury is a finding that the entire sum paid was for insurance, and no part of it for compensation.

The defendant relies upon the case of *Railway Co. v. Coltrane*, 80 Kan. 317, 102 Pac. 835, where it was held that the

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plaintiff was bound by a written release which she signed and afterwards claimed was obtained by fraud. The facts and circumstances upholding the validity of the release in that case were much stronger than those in the present case. The plaintiff was an experienced schoolmistress and wrote upon the voucher in her own hand the statement that she had read the contents thereof and fully understood its terms. It was said in the opinion that, "she ought to be bound by its terms, unless some fact is shown or found clearly indicating that her signature to it was obtained by fraud or mistake." (p. 327.) In that case, as in this, it was alleged that the misrepresentations were made with attempt to deceive and defraud, and also that plaintiff executed the release without knowing its contents. We think the court committed no error in the oral instructions given to the jury, in which they were told they might find for the plaintiff without finding that the agent of the insurance company, at the time he made the representations, intended to practice fraud upon the plaintiff.

The judgment is affirmed.

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No. 21,288.

JOHN WILHITE, *Appellee*, v. JOHN M. MASON et al. (WILLIAM A. DIEBALL, *Appellant*).

## SYLLABUS BY THE COURT.

NOTE AND MORTGAGE—*Date When Due Changed—Findings.* The transcript has been examined and is found to contain evidence to afford firm support for the findings and conclusions of the trial court.

Appeal from Pawnee district court; ALBERT S. FOULKS, judge. Opinion filed February 9, 1918. Affirmed.

*F. Dumont Smith*, of Hutchinson, and *G. P. Cline*, of Larned, for the appellant.

*G. W. Finney*, *Roscoe E. Peterson*, both of Larned, and *F. J. Oyler*, of Iola, for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued to recover on a thousand-dollar note and to foreclose a mortgage securing it, alleging that the maker, Mason, had by mistake drawn the instrument to come due two years from September 1, 1912, instead of June 1, 1914, as the parties agreed; and that the defendant Dieball had bought the property subject to the mortgage. The prayer was for reformation and judgment.

Dieball answered by verified denial, and claim of ownership and possession. There was no charge of fraud, the question being whether or not Dieball can be held by virtue of taking subject to the mortgage as originally written, or whether he consented to or ratified the change which was made by Mason, touching the date when the note and mortgage would come due.

By a series of transactions not necessary to describe, Mason traded for a hotel property at Garfield, Kan., giving a mortgage thereon for a thousand dollars, and sold it to Dieball subject to the mortgage. The case was tried by the court, and findings of fact made, to the effect that the note and mortgage were sent to the bank at Garfield to be delivered to Wilhite; that Wilhite and wife objected to the due date and had the instrument returned to the Masons for correction. That Mason on or about the first day of October, 1912, changed the due date and returned the note and mortgage so changed to the bank, where they were received on or before the third day of October, 1912; that on October 4 Dieball received the deed to the hotel property subject to a mortgage of one thousand dollars due about the 9th of September, 1914.

"At the time William Dieball took the deed from the bank at Columbus the whole transaction was explained to Dieball by John M. Mason.

"On the evening of the 5th of October, 1912, William Dieball arrived at Garfield, Kansas, and went direct to the said hotel and at that time had a conversation with John Wilhite in which the entire transaction was talked over between John Wilhite and William Dieball and that on the 8th day of October, 1912, William Dieball took possession of said hotel property.

"That on the 12th day of October, 1912, William Dieball filed his deed for record and at the time the deed was filed for record the register of deeds informed Dieball that the note and mortgage had been filed for

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record and Dieball at that time examined the note and mortgage and noticed the erasures that had been made thereon.

"The court finds that in the transactions leading up to the acquiring of the title to the hotel property at Garfield, Kansas, by William Dieball, John M. Mason acted as and for William Dieball as his agent."

Dieball appeals, and insists that the finding that the instruments were returned to the bank on or before the third day of October is contrary to the evidence, likewise the finding of agency, and that the court erred in reforming the note and mortgage. His brief is devoted principally to the claim that the findings are not sustained by the evidence and are contrary thereto. The plaintiff having criticised Dieball's abstract and filed a counter-abstract, we have resorted to the transcript furnished by counsel for the defendant, and which contains the evidence, all in the form of depositions.

Wilhite testified that he got acquainted with Dieball on the evening of October 5, 1912. That he received back the note and mortgage from Mason on that date through the bank at Garfield. That he told Dieball all about the change in the dates.

Dieball testified that he first saw Mr. Wilhite on October 5, 1912; that he came up from Old Mexico and reached Columbus, Kan., October 3d, and got his deed in the afternoon of the 4th from the cashier of the First National Bank; that he did not see Mason until the afternoon of the 4th, when he had a talk with him about the transaction, but no further than to get the deed; that Mason said nothing to him about a change having been made in the note or mortgage, "No, sir, not one word about that change." On cross-examination he said he did not know it until he asked Mr. Wilhite if he changed the date; that he came to Garfield on the 5th and took possession of the hotel on the 8th, after having examined the property; and that he had no conversation with Wilhite about the note and mortgage. Further on he stated that when he went to Garfield he asked Wilhite if they changed it, and Wilhite said, "Yes, sir." This was before the mortgage was recorded.

"Q. You went ahead and took the property after you learned that, did you not? A. That was the only thing I could take.

"Q. You had your deed recorded after that? A. My deed was here all ready to have recorded.

"Q. Now you say you had a talk with Mr. Smith? A. Yes, sir.

"Q. And he showed you the note and mortgage? And that was before your deed was recorded? A. Yes, sir.

"Q. And notwithstanding you saw the change in the note and mortgage you had the deed recorded? A. I requested him to record my deed and had possession of the property.

"Q. And you kept possession? A. Yes, sir."

Mr. Mason testified that after Mr. Dieball came to Columbus he explained everything fully, that he showed Mr. Dieball the note and mortgage and explained to him why he had made the change in the dates when they would fall due. In another place he said he was not positive that he went into detail about the change in the date, but that Mr. Dieball knew that the two mortgages were to take care of each other. On redirect examination he stated he did not go into detail about explaining to Dieball about the changes in the note.

While the case is somewhat remarkable for the discrepancies between the examinations and cross-examinations of the witnesses, under the familiar ruling announced in *Acker v. Norman*, 72 Kan. 586, this is a conflict that must be settled by the triers of fact. (*Machine Co. v. Roach*, 91 Kan. 840, 139 Pac. 430; *Terry v. Gravel Co.*, 93 Kan. 125, 143 Pac. 485; *Cornwell v. Moss*, 95 Kan. 229, 231, 147 Pac. 824; *King v. City of Parsons*, 95 Kan. 654, 149 Pac. 699; *Hyland v. Railway Co.*, 96 Kan. 432, 151 Pac. 1107; *Stothard v. Mining Co.*, 98 Kan. 756, 160 Pac. 213.)

From the few items of the testimony we have quoted, the finding as to when the deed was received by Dieball draws sufficient support to forbid its disturbance. The same may be said of the finding as to the information received by Dieball at Garfield on October 5, 1912, and the further one that he recorded his deed after he knew of the changes in the note and mortgage.

As to whether or not Mason acted as agent for Dieball in the hotel transaction is not material. Dieball accepted the deed subject to the mortgage, knowing that the due date had been changed, and he cannot be heard now to say that he was injured by such change. (*Wilhite v. Dieball*, 94 Kan. 78, 145 Pac. 854.)

It follows that the judgment must be affirmed, and it is so ordered.

No. 21,289.

THE FIRST NATIONAL BANK OF HAMILTON, *Appellant*, v. THEODORE F. HOFFMAN and GRACE A. HOFFMAN, *Appellees*.

## SYLLABUS BY THE COURT.

1. *BANKRUPTCY—Discharge as Affecting Debts and Chattel-mortgaged Property of Bankrupt.* The maker of notes gave a chattel mortgage to secure their payment, and afterward filed a petition in bankruptcy. The holder of the notes procured their allowance as a claim against the estate of the bankrupt. All the property covered by the chattel mortgage, except certain exempt property, was sold by the trustee under an agreement between the trustee, the bankrupt, and the holder of the notes. The bankrupt was finally discharged, although the notes were not paid in full. *Held*, that the discharge released the bankrupt from further payment on the notes, and released all the unsold mortgaged property from the lien of the chattel mortgage.
2. *SAME—Discharge as Affecting a Co-debtor.* A discharge in bankruptcy does not release a co-debtor with, or surety for, the bankrupt from liability on a debt, unless that debt has been paid.

Appeal from Greenwood district court; ALLISON T. AYRES, judge. Opinion filed February 9, 1918. Affirmed in part and reversed in part.

*Howard J. Hodgson*, of Eureka, for the appellant.

*O. C. Zwicker*, of Eureka, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff commenced this action to recover from Theodore F. Hoffman the possession of two horses and a cow, and to recover a personal judgment against Grace A. Hoffman for \$94.55, the balance due on a promissory note for \$268.75. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

The defendants were husband and wife. They executed two notes to the plaintiff; one for \$268.75, the other for \$130.90. To secure the payment of the notes, the defendants executed a chattel mortgage on personal property owned by Theodore F. Hoffman, among which personal property were the two horses and the cow. Both notes provided for interest at ten per cent



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per annum from November 13, 1914. After the notes and chattel mortgage had been executed, Theodore F. Hoffman filed a petition in bankruptcy. The plaintiff procured the allowance of the notes as a claim against the bankrupt. The property which belonged to the bankrupt estate was advertised for sale, but the trustee was directed by the referee in bankruptcy not to sell any exempt property. All the personal property owned by Theodore F. Hoffman, including that which was exempt, was covered by the chattel mortgage held by the plaintiff. On the day that the property was advertised for sale, the plaintiff, the defendant Theodore F. Hoffman, and the trustee in bankruptcy entered into a contract which provided that the trustee should sell enough of the property to pay the full amount of the plaintiff's claim and the costs. Property was then sold from which \$468 was realized. The two horses and the cow involved in this action were not sold; they were claimed by Theodore F. Hoffman as exempt from sale under execution. The proceeds of the sale were reported by the trustee in the bankruptcy proceeding, were turned into that proceeding, and were paid out in that proceeding. The expenses were about \$160. The plaintiff received \$307, part payment on its claim.

Theodore F. Hoffman was finally discharged by the following judgment entered by the United States district court:

"Whereas, T. F. Hoffman, of Neal, Kansas, in said district has been duly adjudged a bankrupt, under the Act of Congress relating to bankruptcy, and appears to have conformed to all the requirements of the law in that behalf, it is therefore ordered by the court that said T. F. Hoffman be discharged from all debts and claims which are made provable by said act against his estate, and which existed on the 4th day of May, A. D. 1914, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

The plaintiff received no notice of the hearing of the application for a final discharge. The defendants set up the judgment of discharge as a bar to the present action. The judgment of the trial court in the present action contains the following:

"That the said matter has been settled in the United States Court at Fort Scott, Kansas, in a proceeding in bankruptcy, heretofore had, prior to the bringing of this action, wherein the said Bank, the plaintiff herein, filed its claim in that court against the defendant and received full and complete satisfaction thereon, and that the same was paid by

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the proceedings in bankruptcy, in Case No. 755 on file in the District Court of the United States, Third Division of Kansas, and that the defendant received his final receipt or discharge from that court, No. 755, and that the court finds from the evidence herein adduced that the plaintiff sold about \$465.00 worth of the defendant's property under the chattel mortgage sued upon in this action, through the trustee and receiver in bankruptcy, to satisfy their claim of \$400.35 and interest, retaining the balance for their expenses under said chattel mortgage."

1. What is the effect of the judgment of discharge in the bankruptcy proceeding? The answer to this question is found in the federal statute, which reads:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts." (30 U. S. Stat. at L., p. 550, ch. 541, § 17.)

In *Audubon v. Shufeldt*, 181 U. S. 575, 577, the court said:

"The Bankrupt Act of 1898, provides in § 1, that a 'discharge' means 'the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act.'"

The plaintiff procured the allowance of its claim against the bankrupt, and submitted to the United States district court its right to recover on the notes and its right to the possession of the property under the chattel mortgage. That court allowed the claim, accepted and approved the report of the trustee in bankruptcy, directed the disposition of the proceeds arising from the sale, and finally discharged the bankrupt. The plaintiff agreed that the trustee in bankruptcy should sell enough of the mortgaged property to pay the plaintiff's claim and the expenses of the bankruptcy proceeding. The proceeds of the sale were turned into the court and disbursed by the order of the court. If that was not done properly, the place to make the correction was in the bankruptcy proceeding. It may be that the discharge in bankruptcy was irregularly procured, but it is binding on the plaintiff. The plaintiff cannot question that discharge in this court. (*Brandenburg on Bankruptcy*, 4th ed., § 1524; 7 C. J. 417; 3 R. C. L. 314.)

So far as defendant Theodore F. Hoffman is concerned, the plaintiff cannot look to him for any further payment on either of the notes. The property mortgaged was owned by Theodore F. Hoffman, and his discharge released the property covered by the chattel mortgage from any lien that the plaintiff had to secure the payment of the notes. The judgment denying

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the plaintiff the possession of the horses and the cow is affirmed.

2. There remains for discussion the liability of Grace A. Hoffman. She was not a party to the bankruptcy proceeding. She is not bound by the judgment rendered in that proceeding; neither is the plaintiff bound by that judgment so far as defendant Grace A. Hoffman is concerned. The federal statute reads:

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." (30 U. S. Stat. at L., p. 550, ch. 541, § 16.)

(See, also, *Brandenburg on Bankruptcy*, 4th ed., §§ 1233, 1539-1543; 7 C. J. 409; 3 R. C. L. 341; *Failor v. Wehe*, 98 Kan. 325, 158 Pac. 74.)

The trial court did not specifically find that both the notes had been paid. The court construed the discharge in bankruptcy to be a cancellation of the debt as to both the defendants. That construction was erroneous. The debt was discharged as to defendant Grace A. Hoffman so far only as the debt had been paid. It appears from the evidence abstracted that \$93.55 of the note sued on has not been paid.

The judgment as to Grace A. Hoffman is reversed, and judgment is rendered against her in favor of the plaintiff for \$123.16 (principal \$93.55 and interest \$29.61) and for one-half of the costs.

No. 21,292.

FRANK BATTESE, as Administrator, etc., *Appellant*, v. THE UNION PACIFIC RAILROAD COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

**JURISDICTION**—*Wrongful Death in Foreign State*—*Power of Kansas Administrator to Maintain Action for Damages*. An administrator appointed for the estate of a resident of Kansas by a Kansas probate court has no power to maintain an action in a Kansas court to enforce a liability created by the laws of another state for the wrongful death of the intestate, which occurred in such other state, following *McCarthy, Adm'r, v. Railroad Co.*, 18 Kan. 46.

Appeal from Jackson district court; OSCAR RAINES, judge. Opinion filed February 9, 1918. Affirmed.

*Guy L. Hursh*, and *E. R. Sloan*, both of Holton, for the appellant.

*R. W. Blair*, *T. M. Lillard*, and *A. M. Hambleton*, all of Topeka, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was an action in a Kansas court to recover under a Nebraska statute for the wrongful death of Alex Thompson, which occurred in Nebraska.

Defendant's demurrer to plaintiff's petition was sustained by the trial court—

"On the ground that an administrator appointed for the estate of a resident of Kansas by a probate court of Kansas, has no power to maintain an action in the courts of Kansas to enforce a liability created by the laws of Nebraska for the death of the intestate."

Was this ruling correct? The trial court followed the early case of *McCarthy, Adm'r, v. Railroad Co.*, 18 Kan. 46, where an action by an administrator was sought to be maintained in this state for the wrongful death of Michael McCarthy, which occurred in the state of Missouri. This court held that even if the presumption were indulged that the law of Missouri allowing a recovery for death by wrongful act was the same as in Kansas, yet the action could not be maintained in Kansas by an administrator appointed by a Kansas probate court. That decision was made over forty years ago, and the legislature, which has had many opportunities to change the law as declared in the McCarthy case, has been content to let it stand. Only some extraordinary reason would warrant this court in unsettling this rule after all these years, even although the court might hesitate to adopt it now if the question were new. None of the cases cited by appellant, *Matheson v. Railroad Co.*, 61 Kan. 667, 60 Pac. 747; *Railroad Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156; *Cunningham v. Patterson*, 89 Kan. 684, 132 Pac. 198; nor *Robinson v. Railway Co.*, 90 Kan. 426, 133 Pac. 537, touches the main point which controlled the McCarthy case, and which controls the one now before us. That in some other jurisdictions a different view has been adopted does not justify the abrogation of a rule of Kansas law which has stood unqualified for forty years.

The judgment is affirmed.

No. 21,297.

WILLIAM SCHAAKE, *Appellee*, v. THE KANSAS CITY, KAW  
VALLEY & WESTERN RAILWAY COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. CONDEMNATION PROCEEDINGS — *Railroad Right of Way — Proper Elements of Damages*. Where a railroad is laid through a tract of land and a part of it taken by eminent domain, injury to the remaining land, resulting from the digging of deep borrow pits on the part taken for a right of way, in which stagnant water will accumulate, as well as injury from weeds growing upon the right of way, from which seeds will be carried onto the adjoining land, may be considered in determining the depreciation of the remaining land.
2. SAME—*Not a "Quotient Verdict."* A verdict of a jury will not be set aside because in considering the amount to be allowed for the land taken, as one of the items of the total damages, each of the jurors set down his estimate of such damages and these were added together and the amount divided by twelve, where it does not appear that they agreed in advance that the result so obtained should be their finding, and where an amount differing from the result was adopted upon subsequent consideration, and also where the total amount of damages allowed was determined without resorting to the method of addition and division.

Appeal from Leavenworth district court; JAMES H. WENDORFF, judge. Opinion filed February 9, 1918. Affirmed.

*J. E. McFadden*, and *O. Q. Claflin, jr.*, both of Kansas City, for the appellant.

*S. D. Bishop*, of Lawrence, and *W. W. Hooper*, of Leavenworth, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: In this condemnation proceeding, tried upon appeal in the district court, the jury awarded the plaintiff damages against the defendant in the sum of \$8,000, and upon the appeal to this court the only questions raised relate to the admission of the evidence and the conduct of the jury in arriving at their verdict.

In the construction of a railroad through plaintiff's farm a high hill or embankment was made, and to secure earth for the fills deep borrow pits were made in front of plaintiff's home.

Objection was made to testimony as to the depth and character of the pits, and complaint is made of the admission of the testimony. As water will accumulate in the deep pits and become stagnant, they will injuriously affect the plaintiff and his property. It has already been determined that this is an element of damages in a condemnation proceeding which may properly be submitted for the consideration of the jury: (*W. & W. Rld. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75.)

Some testimony was received, under objection, as to the noxious weeds which grow on the right of way and from which seeds are carried upon the adjoining land. Any definite injury to the adjoining land which, in the nature of things, will cause a real depreciation of its value, may be considered in determining the damage to the land not taken. The danger from fire in such a case may be taken into account in determining the depreciation of a tract of land through which a railroad is built. (*St. L., Ft. S. & W. Rld. Co. v. McAuliff*, 43 Kan. 185, 23 Pac. 102.) So, too, may injury to land resulting from smoke, soot, and noise in the operation of a railroad be considered in fixing the depreciation of the land. (*O. H. & G. Rly. Co. v. Doney*, 3 Kan. App. 515, 43 Pac. 831; 10 R. C. L. 155.) In the same way an injury resulting from weeds growing on the right of way may be given consideration.

It is next contended that the verdict and findings should have been set aside, because the doctrine of chance was applied to their adoption. As we have seen, the total amount of damages was fixed at \$8,000, and in answer to special questions it was shown that this amount was made up of the following items: for the land taken, \$3,100; for the land not taken, \$4,108.37; for damages to growing crops, \$50; and for interest on damages from the time of the condemnation, \$741.63. Upon consideration of the items of damage the jury determined that the total damage for the land taken and for injury to that not taken was \$8,000. In determining the value of the land taken each juror placed his estimate on a slip of paper, and from the addition of these amounts divided by twelve a result was found. There is a dispute in the testimony as to whether the jurors agreed in advance that this result should be treated as the value of the land taken. One juror said that there was no agreement in advance that the result should be taken as the value of the

land. Another said that the quotient obtained was not the amount named in the finding, which was finally determined to be \$3,100. Under the testimony, the process of addition and division is little more than if each one had orally suggested in advance his valuation of the land, and, after finding the average of these estimates, they had finally adopted, not the average so obtained, but an amount not far from that average. Opinions as to the value of land vary greatly, and as the jurors were not bound to accept the average so found and did subsequently consider and agree that \$3,100 was a fair valuation for the land, the result cannot, under the authorities, be regarded as a quotient verdict. (*Bailey v. Beck*, 21 Kan. 462; *Taylor v. Abbott*, 85 Kan. 198, 115 Pac. 979; *Campbell v. Brown*, 85 Kan. 527, 117 Pac. 1010; *Rambo v. Electric Co.*, 90 Kan. 390, 133 Pac. 553; *Sims v. Williamsburg Township*, 92 Kan. 636, 141 Pac. 581; *Hamilton v. Railway Co.*, 95 Kan. 353, 148 Pac. 648.)

In refusing the motion for a new trial the court practically settled all disputes in the testimony as to the conduct of the jury in favor of the plaintiff, and determined that there was no agreement in advance that the result reached in obtaining an average of their valuations should be their finding on that item. On the contrary, it must have been found that, after obtaining the estimates of the several jurors in the manner stated, the item was carefully considered, and the valuation finally fixed was their deliberate judgment.

We find no sufficient reason for disturbing the verdict, and therefore the judgment is affirmed.

No. 21,301.

J. W. LONGFELLOW, *Appellant*, v. THE NATIONAL FIRE INSURANCE COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

INSURANCE—*Loss Payable to Mortgagee as Appointee—Change of Title to Insured Property—Policy Void.* A mortgagee sued to recover on an insurance policy issued to his mortgagor. The mortgage clause merely constituted the mortgagee an appointee to receive the proceeds of the policy for and on account of the assured, subject to all the terms and conditions of the policy. The mortgagor sold and conveyed the property, which act, by the terms of the policy, rendered it void. Application was made to the insurance company to substitute the purchaser of the property as the assured in the policy. The insurance company imposed certain reasonable conditions, which were not complied with until after loss had occurred, when the insurance company canceled the policy, and returned the unearned premium to the mortgagor. *Held*, the mortgagee cannot recover.

Appeal from Wyandotte district court, division No. 3; WILLIAM H. MCCAMISH, judge. Opinion filed February 9, 1918. Affirmed.

W. W. McCanles, of Kansas City, I. A. Smith, W. B. Kelley, both of Independence, Mo., and James H. McVay, of Kansas City, Mo., for the appellant.

E. S. McAnany, M. L. Alden, both of Kansas City, John F. Stout, Halleck F. Rose, and Arthur R. Wells, all of Omaha, Neb., for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one by a mortgagee to recover on an insurance policy issued to his mortgagor. The judgment was for the defendant, and the plaintiff appeals.

The policy was issued to the owner of the property, Joseph Leavick. One of the provisions was that the policy should be void in case of change of title, possession, or interest, or in case of assignment of the policy, unless otherwise provided by agreement indorsed on the instrument. Leavick sold the property and conveyed it to A. L. Landsberg. The sale and conveyance were effected by a realty company, which later



undertook by correspondence to procure an assignment of the policy to the vendee. The insurance company imposed certain conditions, which were not met until after loss had occurred. The delay was caused by the realty company, and was not the result of inattention or other fault of the insurance company. After receiving information that loss had occurred, the insurance company returned to Leavick the proper proportion of the premium for the unexpired time subsequent to the date on which the company learned of the transfer to Landsberg, and canceled the policy as of that date. The plaintiff bases his right to recover on the following stipulation of the policy:

"This company hereby consents that the loss, if any, under this policy, after the same shall have been ascertained and duly verified by the assured, shall be payable to J. H. Longfellow, or assigns, Bonner Springs, Kan., mortgagee, for and on account of said assured; subject, however, to all the terms and conditions contained or referred to in this policy."

The stipulation merely constituted the mortgagee an appointee to receive the proceeds of the policy for and on account of the assured, subject to compliance by the assured with the conditions essential to recovery by him. There is no substantial disagreement among the authorities respecting this subject. A statement of principles and a list of cases in which the principles have been discussed and applied may be found in a case note, 18 L. R. A., n. s., page 197. In the note referred to, the clear distinction between the form of mortgage clause under consideration and the more modern form known as the union mortgage clause is pointed out and illustrated.

When Leavick sold the property he lost the right to claim insurance money, and the mortgagee lost the right to claim through him. The contract of insurance is personal. The insurer has a right to choose with whom he will contract. A substitute for the assured cannot be introduced without the insurer's assent, and he may condition his assent as he may choose. In this instance the insurer desired to know of the proposed substitute if he had ever suffered loss by fire, and if so, the particulars—a very reasonable requirement. The information was not furnished, and Landsberg was not accepted as the person assured in place of Leavick. This being true, the mortgagee cannot claim through Landsberg. The mortgagee has no claim except through an assured owner of the property having a right to recover, and no such person is in existence.

It is not necessary to find an apt name for the status of the policy while negotiations were pending for substitution of a new party for the one originally assured. Leavick was out and Landsberg was not in. The insurer lost no rights by entertaining the proposal to substitute. The negotiations were all in writing. They were fair and easy to understand, on the side of the insurance company, and the letters show that nobody was misled. They came to nothing, and the court properly instructed a verdict for the defendant.

The judgment of the district court is affirmed.

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No. 21,303.

FIDELLA WEAVER (Revived in the name of ED WEAVER, her Administrator), *Appellee and Appellant*, v. THE CITY OF CHERRYVALE, *Appellant and Appellee*.

SYLLABUS BY THE COURT.

1. *PERSONAL INJURIES—Findings—Contributory Negligence.* In an action against a city for injuries sustained by a pedestrian striking her foot against the end of a plank, which at a street corner extended from the pavement to a curb at the edge of the sidewalk, it is held that the plaintiff, in whose favor a general verdict has been returned, cannot be said as a matter of law to be convicted of contributory negligence by findings that she was familiar with the conditions, knew the plank was there, and by the exercise of ordinary care could have seen it immediately before reaching it.
2. *SAME—New Trial—Granted at Succeeding Term—Error.* Where at a subsequent term the court granted a new trial because of such findings, no motion therefor having been filed by either party, such ruling is reversible on appeal.
3. *SAME—Sufficiency of Evidence.* The question of the sufficiency of the evidence, while not presented by a motion for a new trial, held to be involved in the decision on the effect of the findings.

Appeal from Montgomery district court; J. W. HOLDREN, judge. Opinion filed February 9, 1918. Affirmed in part and reversed in part.

J. A. Brady, city attorney, and Chester Stevens, of Independence, for the appellant.

Walter L. McVey, of Independence, and Sullivan Lomax, of Cherryvale, for the appellee.

The opinion of the court was delivered by

MASON, J.: Fidella Weaver was injured while walking along a street in Cherryvale, by a fall caused by a plank on a sidewalk. She brought an action against the city, and in May, 1916, obtained a verdict for \$675, on which judgment was at once rendered. The defendant filed a motion for a new trial and also a motion for judgment in its favor on certain special findings. At a subsequent term of the court, in December, 1916, the motion for a new trial was withdrawn, and, after a hearing upon the motion for judgment on the findings, the court set aside the first judgment "because of the special findings," and ordered a new trial. The plaintiff died after the first judgment, and a revivor was had in the name of her administrator. The defendant appeals from the ordering of a new trial and contends that judgment in its favor should have been rendered on the findings. The plaintiff asks that the order for a new trial be reversed and that the judgment on the general verdict be allowed to stand.

A motion has been filed to dismiss the appeal on the ground that it was not taken within six months from the time the original judgment was rendered. The appeal is taken, however, not from that judgment, but from the orders made at the subsequent term, and was perfected in due time.

1. The plank appears to have been placed so as to form a sort of bridge over a gutter—a substitute for a culvert—used as a part of the west end of the south crossing of a street intersection. From its east end, which rested on the pavement of the north-and-south street, it extended to the west, over the curb and lengthwise along the east-and-west sidewalk. Pedestrians were required, unless they used the plank, to step up or down as they passed from the walk to the crossing. The plaintiff approached the plank from the west, and her fall was occasioned by her foot striking the end of the plank. The findings that are regarded by the defendant as inconsistent with the verdict are, that prior to her injury the plaintiff knew the plank was in use at the place referred to and was familiar with the condition of the pavement, curb, and sidewalk there; and that by the exercise of ordinary care and prudence she could have seen the plank immediately before she reached it. On

the one hand, it is said that "A person who in the lawful use of a highway meets with an obstacle, or defect therein, may yet proceed if it is consistent with reasonable care so to do, even though he thereby incurs some risk, and the fact that he sees or knows of the obstruction or defect and knows its dangerous character, is not conclusive proof that he was negligent in attempting to pass it, and does not preclude a recovery for injuries sustained by him in the attempt, provided he exercised due care" (13 R. C. L. 475) ; and on the other hand, that "If he knows of an obstruction, and knows that by the exercise of ordinary care he can avoid striking it while traveling along the street, his act in striking it is, *per se*, contributory negligence." (13 R. C. L. 477.) The findings are of course to be given a construction that supports rather than one that tends to overthrow the general verdict, where there is room for interpretation. The finding that the plaintiff could have seen the plank by the exercise of ordinary care seems intended to express the idea that if she had made an effort to see it she would have been able to do so by the use of only ordinary care, rather than that, if she did not see it, it was because she was not exercising reasonable prudence. The statement is that she *could* have seen the plank by the exercise of ordinary care—not that she *would* have seen it if she had been exercising ordinary care. The jury also found that the street at the place in question was not lighted in the proper way, and that the city was guilty of "dilatatory neglect" in leaving the plank on the crossing. The general verdict amounts to a finding that the plaintiff did use due care for her own protection, except so far as the special findings affirmatively show the contrary. We think that although she was familiar with the conditions existing, knew of the use being made of the plank, and could have seen it if she had looked for it, she could not on that account be held guilty of contributory negligence as a matter of law. The question whether she failed to exercise due diligence under all the circumstances shown by the findings and evidence, as well as the question whether the city had been negligent, was one of fact to be determined by the jury.

2. While the trial court did not give judgment for the defendant, but merely ordered a new trial, the record affirmatively shows that this action was taken because of the special

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findings. It is at least doubtful whether at a subsequent term of court, in the absence of a motion therefor by either party, a new trial could be granted. Certainly that could be done only under exceptional circumstances. But, in any event, the action taken was based upon the view that the findings were inconsistent with the verdict. This conclusion involved a pure question of law, which is fairly debatable and not free from doubt; but as this court is of the opinion that there was no conflict between the findings and verdict, it follows that the original judgment should be permitted to stand.

3. It is suggested that the evidence was insufficient to support the verdict. That is a question that could be properly raised only by a motion for a new trial. However, substantially the same question is involved in the determination of the effect of the special findings. We think the situation justified submitting to the jury the question of the negligence of each of the parties, and that their decision should be given effect.

The refusal to render judgment on the special findings is affirmed, the order granting a new trial is reversed, and the cause is remanded, with directions to render judgment for the plaintiff upon the verdict.

No. 21,312.

JOHN MCKENNA and O. H. PILLER, Partners, etc., *Appellees*,  
v. JAMES H. MORGAN, *Appellant*.

## SYLLABUS BY THE COURT.

1. **EXCHANGE OF PROPERTY—Cross-demands—Statute of Limitations.** In an action to recover for shortage in quantity of land conveyed to plaintiff by defendant, the defendant counterclaimed for shortage in quantity of a stock of merchandise traded to him for his land. *Held*, section 6994 of the General Statutes of 1915 prevents application of the statute of limitations to the cross-demand.
2. **FRAUDULENT REPRESENTATIONS—Payments Made on Contract—No Waiver of Fraud.** The counterclaim was based on a fraudulent representation respecting the quantity of goods. *Held*, the right to recover damages resulting from the fraud was not defeated by making payments and otherwise recognizing the obligation of the contract.
3. **SAME—Representation as to Quantity of Goods—Not Mere Expression of Opinion.** The representation was that the stock of merchan-

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dise contained sufficient goods, invoiced at cost, to amount, with certain articles of agreed value, to a certain sum. *Held*, the representation was not a mere expression of opinion as to value.

4. *SAME—Evidence—Issue for Jury.* The evidence in support of the counterclaim examined, and held sufficient to warrant its submission to the jury.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Reversed.

*E. C. Wilcox, Myrtle Youngberg*, both of Anthony, and *H. C. Kirkendall*, of Cherokee, Okla., for the appellant.

*John McKenna*, of Kingman, and *Donald Muir*, of Anthony, for the appellees.

The opinion of the court was delivered by

BURCH J.: The action was one to recover for shortage in quantity of land conveyed to the plaintiffs by the defendant. The defendant counterclaimed for shortage in quantity of a stock of goods traded to him by the plaintiffs as part consideration for conveyance of the land. A demurrer was sustained to the defendant's evidence, and he appeals.

The portion of the answer relating to the counterclaim was to this effect: In the trade the defendant accepted certain property at an agreed value—a warehouse at \$5,000, a team and wagon at \$300, a hearse at \$2,000, and store fixtures at \$600. The plaintiffs falsely represented that a stock of merchandise contained sufficient goods, invoiced at cost, to amount, with the articles of agreed value, to \$32,000. When an invoice was suggested, the plaintiffs said they would guarantee that the merchandise, together with the other property, would invoice the amount stated. Relying on the representation, the defendant accepted the merchandise, which when invoiced amounted to \$16,975. The defendant's evidence tended to support his pleading. In ruling on the demurrer the court did not indicate what it considered the legal defect in the defendant's evidence.

It is suggested by the plaintiffs that the defendant's counterclaim was barred by the statute of limitations, the counterclaim being based on fraud, and the answer having been filed more than two years after the fraud was discovered. Section

6994 of the General Statutes of 1915 prevents application of the statute of limitations to cross-demands of the character here involved.

The plaintiffs suggest that the defendant waived the fraud, and consequently the right to counterclaim for damages, by making payments and otherwise performing on his side after the invoice showing shortage was completed. Cases are cited like that of *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785, a case of rescission, in which it was said:

"If, after the discovery of fraud in a contract, the party imposed upon, without objection, pays several installments upon it, and sells one of the tracts of land embraced therein, he waives the fraud and affirms the contract." (Syl. ¶ 4.)

What is meant by expressions of this character is that the right to rescind is waived, and the contract is affirmed by performance after discovery of the fraud. One who has been induced to contract to his injury by false representations has two remedies, rescission and damages. In the one case the obligation of the contract is disavowed; in the other the obligation is recognized and accepted, and the party defrauded may perform on his side, and recoup his loss by damages.

It is suggested by the plaintiffs that the representations were not actionable because they amounted to no more than an expression of opinion as to value by a seller dealing with a buyer who was required to be on his guard. The representation pleaded was that, measured by a specific standard, a specific quantity of goods existed. The evidence fairly supported the pleading.

The plaintiffs suggest that the allegation of an agreed value for certain articles was formally denied, and that the agreed value of some of the articles was not mentioned in the testimony. The discrepancy between the represented quantity of goods and the quantity disclosed by invoice was great enough to cover the omitted items several times. It is not likely the court based its decision on this technical failure of proof easily supplied and relating to a matter which, so far as the record discloses, was not seriously contested.

The plaintiffs suggest that the defendant did not rely on the representations, but his testimony was otherwise.

The plaintiffs suggest that the defendant seeks to enforce

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against the members of a firm a warranty made by a single partner. The action was one for damages for false representations, but there is no reason why a member of a firm having authority to sell may not bind the firm by a warranty of quantity.

No other basis for the decision of the district court is suggested. No sufficient legal basis is apparent.

The jury disagreed respecting the plaintiffs' claim, and another trial of the issues tendered by the petition is necessary. The judgment of the district court sustaining the demurrer to the defendant's evidence is reversed, and the court is directed to determine at the trial the counterclaim presented by the defendant's answer.

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No. 21,313.

THE FARMERS & MERCHANTS STATE BANK, *Appellee*, v. L. C. BEAL, *Appellant*, et al.

SYLLABUS BY THE COURT.

PROMISSORY NOTE — *Collateral Security* — *Innocent Holder* — *Extension*.

A bank loaned a sum of money to a customer, taking his promissory note therefor, secured by that of another, payable to such customer, as collateral. The consideration for the collateral note failed. The bank extended the collateral note at the request of the maker, and on payment of interest by him. After the original date of maturity, and before the expiration of the extension of the collateral note, the bank returned the principal note to the borrower, marking it paid on its ledger, and took over the collateral note, entering it as discounted on its record. There was nothing in the evidence to indicate any notice or knowledge on the part of the bank of any infirmity in or defense to the collateral note. *Held*, that as to the defendant, Beal, the bank is an innocent holder.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Affirmed.

*E. C. Wilcox, Myrtle Youngberg, W. R. Rowell*, all of Anthony, and *H. C. Kirkendall*, of Cherokee, Okla., for the appellant.

*Donald Muir*, of Anthony, for the appellee.



The opinion of the court was delivered by

WEST, J.: The defendant executed a note for \$150 to Ed Lane, who bought a thrashing machine of one Raine, and had an arrangement by which Raine was to hold the note until Lane should pay it by thrashing certain wheat, when the note was to be returned to the maker. Raine borrowed \$150 of the plaintiff bank, putting up the Beal note as collateral. After the principal note became due, the bank handed it back to Raine and took the Beal note instead, entering upon its ledger that the Raine note was paid September 18, 1915, and on its discount record that the Beal note was discounted on the same date. The bank sued Beal on his note, and he pleaded want of consideration by reason of failure to thrash the wheat according to the agreement already indicated, and, further, that the bank had taken the note as collateral after it had become due and with full knowledge of the consideration for which it was given. The bank recovered, and Beal appeals.

Error is assigned on the overruling of defendant's demurrer to plaintiff's evidence, the giving and refusing of certain instructions, and the denial of defendant's motion for new trial. It is also claimed that the verdict is not supported by the evidence.

Instructions were refused, to the effect that if after receiving the note as collateral security the bank discharged the principal obligation it would not be entitled to retain the collateral longer and could not maintain its action, and that if after the principal note became due the bank closed its transaction with Raine and became the owner of the collateral note it would not thereby become a holder in due course.

Assuming that the consideration for the Beal note failed, which seems to be the fact, and that he would therefore have a good defense except as to an innocent holder, the question is whether or not the bank is such holder.

The cashier testified that, after he notified Beal that he had the note, Beal came in and paid the interest on it and extended it for six months from the time it was given.

"The note I took from Raines to which I took this one as collateral, I gave back to him when he paid it. Mr. Raines wanted to borrow the money and I took this note as collateral to his note. I turned it back to

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him simply because I considered I could collect this and didn't care to hold the other because I could not collect it. I came to that conclusion after harvest I think as late as August. Up to that time I had just loaned the money to Mr. Raines and I then decided I would take this note and I turned his note back to him.

"In a few days Mr. Beal came into the Bank, paid up the interest on the note, and same was extended by the bank. The Raine note was turned back to the maker, and the bank elected to hold the collateral for the debt."

Counsel for Beal contend that as the bank took over the collateral note after maturity it was no longer an innocent holder. But the trouble is, that after its extension by the bank, at the request of Beal, the collateral note would not come due until October, and when the bank took it in payment of the Raine note it was not yet due. At any rate, there is nothing to indicate that the bank at this time had any notice or knowledge of any infirmity in the Beal note.

Whether or not the plaintiff upon purchasing the Beal note simply added the full title to the title which it had already held as collateral security, and whether or not the latter merged in the former, need not be determined. Neither is it essential to consider what the rights of a purchaser from the bank might have been after the original maturity and before the expiration of the extension.

On the note itself was indorsed: "Int. paid for 6 months by L. C. Beal." As the note was for 90 days, this was a plain indication that a 90-day extension had been agreed upon, and, whatever notice this might have imparted to a third person purchasing between the two dates of maturity, the defendant cannot be heard to say, after procuring the extension, that the note was not extended, and hence was past maturity when taken over by the bank.

The instructions requested by the defendant were on the assumption that the collateral note was past due when the bank took it over, and hence their refusal was not error.

As to the complaint that the charge left the jury to determine what the defense was, it must be observed that the instructions taken together fully advised the jury what the claims of the parties were.

Finding no error, the judgment is affirmed.

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Redfern v. City of Anthony.

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No. 21,314.

J. M. REDFERN, *Appellant*, v. E. M. EBY et al. (THE CITY OF ANTHONY, *Appellee*).

## SYLLABUS BY THE COURT.

CONSTRUCTING CITY SEWER—*Injury to Workman Not within Terms of Compensation Act.* While constructing a sewer, a city is not engaged in an enterprise involving any element of gain or profit, and does not come within the terms or operation of the workmen's compensation act.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed February 9, 1918. Affirmed.

*E. C. Wilcox, Myrtle Youngberg*, both of Anthony, and *H. C. Kirkendall*, of Cherokee, Okla., for the appellant.

*H. O. Davis*, and *Vernon Day*, both of Anthony, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: In this action the plaintiff seeks to recover under the workmen's compensation act. The city of Anthony demurred to the plaintiff's petition; that demurrer was sustained, and the plaintiff appeals.

The petition alleged, in substance, that the plaintiff was employed by E. M. Eby, a contractor who was building a sewer system for the city of Anthony; that while the plaintiff was working for Eby in the construction of the sewer system, a ditch caved in and buried a number of other workmen; that the plaintiff was directed by the foreman in charge of the work to remove the dirt from those buried; that while the plaintiff was engaged in that work, the walls of the ditch wherein he was working suddenly caved in, and the dirt, boards, and timber closed in about the plaintiff and injured him; and that these injuries totally incapacitated him for work during a period of eight weeks, and partially incapacitated him for work during the remainder of his life.

The question presented by the demurrer to the petition has been disposed of by this court. In *Roberts v. City of Ottawa*, 101 Kan. 228, 165 Pac. 869, this court said:

"A city in constructing a lateral sewer, while exercising its proprietary power, is not engaged in an enterprise involving any element of gain or

## Redfern v. City of Anthony.

profit and therefore is not within the terms or operation of the workmen's compensation act." (Syl. ¶ 1.)

"Under the rulings referred to distinguishing between a city's governmental and proprietary powers, the building of the lateral sewer in question doubtless comes within the latter rather than the former. But, as pointed out in the Gray case, in order to bring the city within the statute this proprietary work must have been in the nature of a business or trade involving the idea of profit or gain. Certainly the construction of a lateral sewer to be paid for by the property owners of a given sewer district is not trade or business in the sense of profit, or in any commercial sense." (p. 230.)

In *Gray v. Sedgwick County*, 101 Kan. 195, 165 Pac. 867, the case above referred to, this court said:

"The general purpose of the workmen's compensation act is to provide for compensation to workmen injured in hazardous employments carried on for the purpose of business, trade, or gain.

"A county in resurfacing a county road is not engaged in trade or business within the terms or operation of the workmen's compensation act. (Syl.)

In the Gray case, the plaintiff was injured while hauling gravel for use on the county road in Sedgwick county, which road the board of county commissioners and the county engineer were grading and surfacing.

The statute under which the plaintiff seeks to recover, section 5900 of the General Statutes of 1915, in part, reads:

"This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments where a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain. . . ."

A sewer is neither constructed nor operated by a city for the purpose of business, trade, or gain. Sewers are paid for by taxation. In operating sewers, there is no sale or purchase of any property or commodity; neither is there any trade nor gain. In constructing sewers, cities, in their corporate capacity, do not engage in trade within the meaning of the workmen's compensation act, and do not receive any gain or profit.

To come within the operation of the workmen's compensation act, a workman must be employed in one of the various classes of enterprises named in the statute, and that enterprise must be conducted for the purpose of business, trade, or gain.

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Golder v. Golder.

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The city did not come within the provisions of the workmen's compensation act. The plaintiff's petition did not state a cause of action against the city. The demurrer to the petition was properly sustained, and the judgment is affirmed.

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No. 21,315.

JESSE S. GOLDER et al., *Appellants*, v. WILLIAM L. GOLDER et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. GIFT—*Execution of Deed—Undue Influence—Evidence.* Evidence relating to the validity of a deed to a farm examined, and held sufficient to show that the deed was a lawful gift, that the grantor acted intelligently, independently, and of her own volition, and free from undue influence on the part of the grantee.
2. SAME—*Incompetent Witness—Deposition Taken by Opposite Party—Incompetency Waived.* Where the plaintiffs take the deposition of the defendant grantee of a deed which is assailed on the grounds that the grantor was mentally incompetent to make it and that she had made it through the undue influence of the grantee, and where such deposition is filed in court by the plaintiffs, but not offered in evidence by them, the taking of defendant's deposition by the plaintiffs is a waiver of objections to his testimony, and the deposition may properly be read in evidence on behalf of the defendant grantee.

Appeal from Osage district court; ROBERT C. HEIZER, judge. Opinion filed February 9, 1918. Affirmed.

J. T. Pringle, of Burlingame, and Seymour S. Sidner, of Fremont, Neb., for the appellants.

A. B. Crum, of Lyndon, and Henry M. Kidder, of Fremont, Neb., for the appellees.

The opinion of the court was delivered by

DAWSON, J.: This was an action to set aside a deed to a farm on the ground that at the time of its execution the plaintiff was mentally incompetent, and that the deed was procured through the undue influence of the grantee. The defendant, William L. Golder, prevailed.

The errors assigned are that the judgment was contrary to the evidence, and that the testimony of the grantee should not have been admitted.

Touching the first of these propositions, it cannot be said that the judgment was not sustained by the evidence. Most of the evidence was in the form of depositions, and a considerable part of it not only failed to show mental incompetency on the part of the grantor and failed to show undue influence on the part of the grantee, but did tend to show that the grantor acted intelligently, independently, and without constraint or influence of any sort on the part of the grantee—except what might be inferred from his kindness in opening his home to her in the loneliness and growing physical infirmities of the last few months of her life. Even applying the rule that one who receives a large gift from an elderly and feeble person, and who stands in an intimate or fiduciary relation to such person, must shoulder the burden of showing that the gift was voluntary and without constraint or undue influence, and that the donor of the gift was of sound mind and knew and understood what she was about, a considerable portion of the evidence met such requirements. All that was adduced to the contrary—giving it the largest credence—amounted to little more than to show that during the last year or two of the grantor's life she became negligent in her attire, and that she was inclined to be forgetful and frequently repeated herself in conversations.

On the second ground of error, that the defendant grantee's evidence should not have been admitted, his testimony was in the form of a deposition taken by the plaintiffs and filed by them; and, of course, the defendant could introduce it, although the plaintiffs refrained from using it. (*Rucker v. Reid*, 36 Kan. 468, 13 Pac. 741; *Hale & Bro. v. Gibbs*, 43 Iowa, 380; *Little v. Edwards*, 69 Md. 499; *Byers v. Orensstein*, 42 Minn. 386; 13 Cyc. 979, 980.)

The taking of depositions is not a mere fishing excursion, nor is it authorized for the mere purpose of prying into the defense of an adversary who is disqualified as a witness in his own behalf. When plaintiffs called Golder as their witness and examined him under oath, and filed his deposition in court, they thereby waived all proper objections as to Golder's competency to give the evidence. (*Borgess Inv. Co. v. Vette*, 142 Mo. 560; *Rice v. Waddill*, 168 Mo. 99; *Thomas v. Irvin*, Adm'r, 90 Tenn. 512.)

Affirmed.

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Park Association v. City of Hutchinson.

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No. 21,316.

THE RIVERSIDE PARK ASSOCIATION, *Appellee*, v. THE CITY OF HUTCHINSON et al., *Appellants*.

## SYLLABUS BY THE COURT.

PAVING—*Special Assessments—Injunction—Limitation of Actions*. The statutory limitation that an action cannot be maintained to enjoin or contest a special assessment for the improvement of a street, unless it is begun within thirty days after the amount due on each lot or piece of ground assessed is ascertained (Gen. Stat. 1915, § 1217), applies to invalidity as well as irregularity in the proceedings, including objections that the taxing district extends over too much ground, and also where the land assessed included abutting ground not platted, and also lots and blocks lying beyond the unplatted part which did not abut on the improved street. Invalid proceedings of the kind named, which would defeat an assessment if attacked in time, are not open to attack if the time limit has expired.

Appeal from Reno district court; FRANK F. PRIGG, judge.  
Opinion filed February 9, 1918. Reversed.

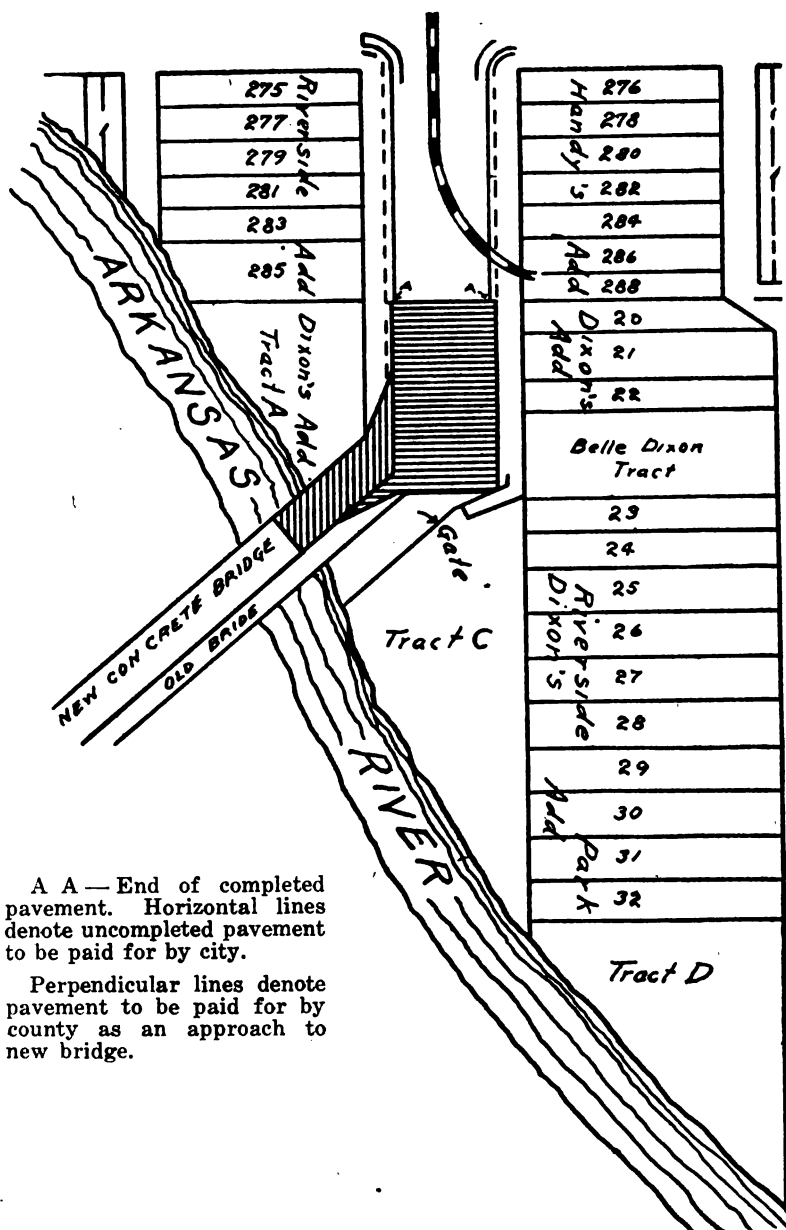
*Walter F. Jones*, of Hutchinson, for the appellants.

*E. T. Foote*, of Hutchinson, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was a suit to enjoin the collection of a paving tax assessed upon plaintiff's property. On July 6, 1915, the city of Hutchinson passed an ordinance providing for the paving of South Main street from the south line of Avenue F to the Arkansas river. The following plat shows the portion of the street in question and the situation of the surrounding properties:

## Park Association v. City of Hutchinson.



A A — End of completed pavement. Horizontal lines denote uncompleted pavement to be paid for by city.

Perpendicular lines denote pavement to be paid for by county as an approach to new bridge.



On July 30, 1915, a contract was made for the paving, and, as first drawn up, it provided for the paving to extend to the river, but it was afterward changed (and according to the testimony of the city clerk, without authority for the change) to read, from Avenue F to the south line of Riverside addition and Handy's addition. On November 17, 1915, appraisers appointed by the city commissioners made an appraisal of lots 275 to 285 in Riverside addition and lots 276 to 288 in Handy's addition, but nothing south of that was included in the report. On November 26, 1915, the city commissioners, acting as a board of equalization, made some changes in the appraisers' report, and then also included an assessment of lots 20 to 32 in Dixon's addition, tract A, tract C, and Belle Dixon tract; and in an ordinance published February 17, 1916, the assessment for all of the lots and tracts mentioned was made. Plaintiff is the owner of lots 23 to 32 and tracts C and D in Dixon's addition, and taxes upon this property, except tract D, were certified by the city clerk upon the roll, to be collected. Plaintiff's action to enjoin its collection was brought December 11, 1916.

The pavement was completed as far as the point where the horizontal lines are shown on the plat, awaiting the completion of a new bridge by the county. The pavement on the approach to the bridge, indicated on the plat by the vertical lines, is to be paid for by the county.

The injunction prayed for was granted as to lots 23 to 32 in Dixon's addition. The defendants appeal.

The only question we need to consider is one of limitation on the right of plaintiff to enjoin or contest the levy of the special assessment. Under a statutory provision, the right to enjoin or contest such a levy can be exercised only within thirty days after the assessment is ascertained. (Gen. Stat. 1915, § 1217.) Plaintiff did not commence this action until ten months after the assessment had been ascertained. It is insisted by the plaintiff that the city acted without authority in that it assessed property not adjoining the street to be improved, and also that the assessment attempted was not made in the manner prescribed by law. The bar of the statute applies even if the defendants acted without authority in the inclusion of property that was not subject to assessment. It has

already been determined that the thirty-day limitation applies to void assessments as well as to irregular ones. (*City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82.) In *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299, and the same case on rehearing, 93 Kan. 1, 142 Pac. 268, it was ruled that the limitation in question cuts off all defenses of every kind and character, including assessments fraudulently made and those which were made without jurisdiction or authority. That holding has been followed and approved in *Railway Co. v. City of Chanute*, 95 Kan. 161, 147 Pac. 836; *Arment v. Dodge City*, 97 Kan. 94, 154 Pac. 219; *Wyandotte County v. Haskell*, 97 Kan. 304, 154 Pac. 1029. No more reason can be found for excepting from the limitation a defense that the assessment is invalid because of including platted and unplatted land or land extending too far from the improved street than there was for excepting a defense that the assessment was fraudulent and void. The legislature manifestly intended to bar an action for every defect, whether it be for irregularity or invalidity, if not begun within the prescribed time. Within that time the plaintiff might have contested the right of the city commissioners to make an assessment on property which the appraisers had not included in their report, and also where the taxing district had extended beyond the legal limits. The intention of the legislature was, that public improvements should not be long delayed by contests of this character, nor the assessment proceedings interrupted by belated litigation; and so, property owners who propose to challenge an assessment for any kind of defect are required to do so promptly, or not at all. The validity of such a law is beyond question.

It follows that the judgment must be reversed and the cause remanded with instructions to enter judgment for the defendants.

No. 21,320.

H. D. HOVER, *Appellant*, v. D. S. McNEILL and ALICE McNEILL, *Appellees*.

## SYLLABUS BY THE COURT.

OIL AND GAS LEASE—*No Conveyance of Real Estate*. The provisions of an oil and gas lease examined, and held the instrument did not operate to sever and convey, as real estate, subsurface mineral deposits.

Appeal from Greenwood district court; ALLISON T. AYRES, judge. Opinion filed February 9, 1918. Reversed.

*Howard J. Hodgson*, of Eureka, for the appellant.

*B. R. Leydig*, and *K. M. Geddes*, both of El Dorado, for the appellees.

The opinion of the court was delivered by

BURCH, J.: The action was one to establish an oil and gas lease. The plaintiff was defeated on the ground that the instrument under which he claimed was a deed of mineral in place, which had not been recorded or returned for taxes. The plaintiff appeals.

The lease reads as follows:

## "OIL AND GAS LEASE.

"In consideration of the sum of one dollar and of the covenants and agreements hereinafter contained, D. S. McNeill and Alice McNeill, his wife, first parties, hereby grant unto H. D. Hover, second party, successors and assigns, all the oil, gas and minerals in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling or operating for oil, gas or minerals, to erect, maintain and remove all buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil, gas or minerals. Provided: That the first party shall have the right to use said premises for farming purposes, except such part as is actually occupied by second party, namely, a lot of land [description].

"The above grant was made on the following terms:

"1st. Second party agrees to begin drilling a well on said premises within six months from this date, or thereafter pay the first party one dollar per acre annually until the said well is drilled, or the property hereby granted is conveyed to the first party. Rental payable quarterly in advance.

"2nd. Should oil be found in paying quantities upon the premises, second party agrees to deliver to the first party in tanks or in pipe line

## Hover v. McNeill.

with which it may connect with the well or wells, the one-eighth part of all the oil produced and saved from said premises.

"3rd. Should gas be found, the second party agrees to pay the first party one hundred dollars annually for every well from which gas is used off the premises.

"4th. First party shall be entitled to enough gas free of cost to heat and light one residence on said premises as long as the second party shall use gas from said premises under this contract, but shall lay and maintain the service pipes at his own expense, and use said gas at his own risk. The said party of the second part further to have the privilege of excavating for water and use of sufficient water, gas and oil from the premises herein leased to run the necessary engines for the prosecution of said business without cost to said second party.

"5th. Second party shall bury, when requested to do so by first party, all the gas and oil lines used to conduct gas or oil off said premises and pay all damages to timber and crops by reason of the burying, repairing or removal of lines of pipe over said premises.

"6th. No well shall be drilled nearer than 200 feet to any building on said premises.

"7th. Second party may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void.

"8th. A deposit to the credit of the lessor in Eureka Bank, Eureka, Kan., to the amount of any of the money payments herein provided for, shall be a payment under the terms of this lease.

"9th. It is agreed that this lease shall remain in force for the term of ten years from this date, and as long thereafter as oil and gas, or either of them, is found upon said land by party of the second part, their successors or assigns.

"10th. It is further agreed that the lessee, or assigns, may surrender any part of the above security and pay rental only on the number of acres not surrendered.

11th. It is further agreed that if party of the second part fails to comply with the terms of this lease, this lease becomes null and void and reverts back to party of the first part, and shall be released from record without cost to party of the first part."

The statute applies to cases in which subsurface minerals are in legal contemplation severed from the earth in which they are contained and vested in one owner, while the remainder of the real estate is vested in fee in another owner. (Gen. Stat. 1915, § 11280.) The question is, Does the lease effect such a severance? The court is of the opinion it does not.

The provisions of the instrument which indicate an intention to convey mineral deposits or strata are the grant of all the minerals mentioned, and the provisions for reconveyance

in paragraphs 1 and 7. Use of the word "grant," however, is quite inconclusive. The term was appropriate to confer the right to enter, occupy, explore, and operate, and was appropriate to confer title to personal property—oil or gas produced and severed. (2 Blackstone's Commentaries 440, 441.) The provisions for reconveyance are compatible with the notion of release specifically provided for in paragraph 11.

The provisions of paragraphs 9 and 10 are quite inconsistent with the notion of a conveyance of real estate. By paragraph 9 the instrument is made a simple term lease for exploration and production—ten years, and as much longer as oil and gas are found. By paragraph 10 a simple surrender operates to relieve from payment of rent for any portion of the tract. Paragraph 11 carries out the thought of the two preceding paragraphs, and provides for forfeiture and release.

It is suggested that the district court was of the opinion the instrument closely resembled the one which was held to operate as a conveyance of real estate in the case of *Gas Co. v. Oil Co.*, 83 Kan. 136, 109 Pac. 1002. The instrument in the case referred to not only granted, but conveyed and warranted the premises described. The conveyance was extended to heirs as well as successors and assigns. The instrument made a characteristic reservation, and reconveyance was the only method provided for divesting the title of the grantee. Provisions similar to those contained in the last three paragraphs of the instrument here involved were not inserted.

The judgment of the district court is reversed, and the cause is remanded with direction to enter judgment for the plaintiff.

## White v. Kansas City.

No. 21,324.

W. E. WHITE, *Appellant*, v. THE CITY OF KANSAS CITY,  
*Appellee*.

## SYLLABUS BY THE COURT.

HIGHWAYS—*Heavy Vehicles—Duty to Planck Bridges and Culverts—Statute Applies to Horse-drawn Wagons.* A purpose to legislate concerning horse-drawn wagons, as well as automobiles, is shown by the amendment of a statute requiring certain precautions in crossing a bridge, the relation of the two acts being indicated by the following reprint, in which omitted words are enclosed in brackets, and added words are italicised:

"That all persons owning, controlling, operating, or managing steam or gasoline threshing-machines, sawmills, [or steam] traction engines or transfer wagons or vehicles of any kind used for the transportation or distribution of oil or other merchandise or commodity and [in] moving the same over the public highway are required to lay down planks not less than one foot wide, three inches in thickness, and of sufficient length, on the floor of all bridges and culverts situated on the public highway, while crossing the same, for the wheels of said engine[s] of any kind to run on while crossing such bridge or culvert; Provided, That this section shall not apply to any machine or engine not exceeding [one] three tons in weight. . . ."

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISHER, judge. Opinion filed February 9, 1918. Affirmed.

James L. Hogin, and Roy R. Hubbard, both of Kansas City, for the appellant.

H. J. Smith, Lee Judy, and Thomas M. Van Cleave, all of Kansas City, for the appellee.

The opinion of the court was delivered by

MASON, J.: W. E. White, while hauling rock in a horse-drawn wagon, was injured by the giving way of a bridge in Kansas City, Kan. He brought an action against the city. A demurrer to his evidence was sustained, and he appeals.

The wagon used by the plaintiff weighed 1,800 pounds and carried a load of 5,200 to 5,500 pounds. He had not laid down planks for the wheels to run on while crossing the bridge. The case turns upon the question whether the law requiring that to be done in the case of loads weighing more than three

tons applies to horse-drawn vehicles, or is limited to those moved by mechanical power. The first legislation on the subject was enacted in 1886. (Gen. Stat. 1909, § 7317.) The statute in effect at the time of the injury was passed in 1911. It was not in form an express amendment of the earlier one; but in the course of a general revision of the road law, the section cited was repealed and a new one inserted which was obviously based upon it, the practical effect being to amend rather than to repeal it. (Gen. Stat. 1915, § 8799.) The relation of the two sections is shown by the following reprint, in which words used in the original act but omitted from the amendment are inclosed in brackets, and words added by the new act are italicised:

*"That all persons owning, controlling, operating or managing steam or gasoline threshing-machines, sawmills, [or steam] traction engines or transfer wagons or vehicles of any kind used for the transportation or distribution of oil or other merchandise or commodity and [in] moving the same over the public highway are required to lay down planks not less than one foot wide, three inches in thickness, and of sufficient length, on the floor of all bridges and culverts situated on the public highway, while crossing the same, for the wheels of said engine[s] of any kind to run on while crossing such bridge or culvert; Provided, That this section shall not apply to any machine or engine not exceeding [one] three tons in weight. Provided further, That no person, firm or corporation seeking to recover damages against any city, township or county under the provisions of this section, shall secure a judgment therein, unless the jury shall find that such person, firm or corporation had before receiving the injury complained of, complied with the provisions of this section."*

The addition of "gasoline" to the enumeration of the kinds of threshing-machines referred to was almost a matter of course in view of the extended use of the gasoline engine. The word "steam" as it appeared the second time in the original section was obviously omitted in the revision on the theory that it was superfluous, possibly because the prior phrase "steam or gasoline" was regarded as qualifying sawmills and traction engines as well as threshing-machines, but more probably because such a qualification was deemed unnecessary in referring to vehicles which by their very nature are self-propelled. The important and doubtful question is as to the intention indicated by adding to the list of vehicles covered by the act the clause "or transfer wagons or vehicles [of any kind] used for the transportation or distribution of

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oil or other merchandise or commodity." The city maintains that the purpose was to extend the application of the law to all vehicles used for carrying goods (as distinguished from passengers), whether driven by mechanical power or drawn by horses. The plaintiff contends that the object was to include only goods-carrying vehicles which were operated by steam or gasoline. To this court it seems (as it evidently did to the trial court) that the insertion of the new clause in the existing statute (for that is what the action of the legislature amounted to) naturally suggests a purpose to make the statute, which had formerly applied only to threshing-machines, sawmills, and traction engines, cover also all vehicles carrying goods, irrespective of the means by which they are propelled. That interpretation therefore should prevail, unless some specific and sufficient reason exists to the contrary.

The plaintiff insists that the words "steam or gasoline" should be regarded as limiting "transfer wagons and vehicles," as well as "threshing-machines," because such is the proper construction of the language used, according to the rules of grammar, and also because by the rules of associated words and of "*ejusdem generis*" the terms added to the original list of vehicles should be regarded as relating only to articles of the same general character as those previously named. Neither ground impresses us as well founded. Grammatically the language appears open to either construction, but the added terms seem so specific as to render the other tests inapplicable. While in many connections the word "wagon" might be construed as including automobiles, it seems unlikely that in framing legislation in 1911, the draftsman of a bill would have used the phrase "transfer wagons" if he had had in mind only automobiles; in that case he would more naturally have written "motor trucks," or used some equivalent expression. It is suggested that a sufficient reason for regulating the crossing of a bridge by an automobile, while leaving the passage free to a horse-drawn wagon of equal weight, can be found in the fact that the wheel base of the former is shorter than the distance from the heads of a team of horses to the rear wheels of a wagon they are drawing, and the load on a motor truck is so distributed as to increase the stress. Granting that this may be so, we do not find in the



language used a purpose to make such a distinction. The object of the legislature appears to us to have been to extend the statute so as to reach all vehicles the weight of which was at all likely to exceed the newly fixed weight of three tons, pleasure and passenger vehicles being excluded doubtless upon the theory they would seldom or never pass that limit.

It is suggested that if it had been the purpose of the legislature in amending the law to make it applicable to horse-drawn vehicles, a change would have been made in the expressions "for the wheels of said engines of any kind to run on," and "this section shall not apply to any machine or engine not exceeding three tons in weight." To have made the language quoted entirely appropriate it would doubtless have been better to have changed it even if only automobiles had been in contemplation, for "engines" and "machines" are not words naturally suggesting even motor trucks. Where the subjects referred to in a piece of legislation have once been fully enumerated, the omission of some of them from a subsequent list is readily regarded as inadvertent, and "the last enumeration may be extended by construction to correspond with the one first made." (*Landrum v. Flannigan*, 60 Kan. 436, 439, 56 Pac. 753.)

By a separate section a violation of the provisions of the section already referred to is made a misdemeanor. (Gen. Stat. 1915, § 8801.) It is argued that the statute being penal should be strictly construed. Notwithstanding the penalty, the purpose of interpretation is to arrive at the real intention of the legislature (36 Cyc. 1183-1185), and we regard that as reasonably clear.

The section of the statute (Gen. Stat. 1915, § 8800) immediately following that under consideration imposes upon persons operating steam traction engines certain duties relating to their conduct while passing other vehicles. It is argued that the general subject of these sections and the next is the regulation of motor vehicles, and that they should be construed as parts of a general plan having that purpose. If that were true of the original enactment, the amendment referred to deprives the argument of most of its force.

The legislature at its last session replaced the section we have been considering by a new one (Laws 1917, ch. 80, § 29)

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the application of which is limited to persons operating "a steam or gasoline threshing engine, sawmill engine, or traction engine." The plaintiff considers this an indication that the purpose from the first has been to confine the application of the statute to motor vehicles. A legislative interpretation does not operate retroactively—at least not with controlling force. But we regard this new statute as evidencing a change of policy rather than an attempt to declare the meaning of an existing law.

The judgment is affirmed.

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No. 21,374.

THE STATE OF KANSAS, *ex rel.* BLANCHE CARMONS, *Appellant*,  
v. ROBERT L. WOODS, *Appellee*.

SYLLABUS BY THE COURT.

1. **ILLEGITIMATE CHILD**—*Presumption of Defendant's Innocence—Instruction.* In a bastardy proceeding, the instruction given to the jury that "the law presumes morality and uprightness until the contrary is made to appear from the evidence, and you are instructed that defendant in this case is presumed to be innocent of the charge made against him and that presumption remains with him through all stages of the trial and until overcome by the evidence of the state by a preponderance of the credible evidence," is held not erroneous.
2. **EVIDENCE**—*Not Directly Contradicted—Province of Jury.* A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they find to be unreliable, although it may be uncontradicted.

Appeal from Chase district court; WILLIAM C. HARRIS, judge. Opinion filed February 9, 1918. Affirmed.

W. H. Carpenter, of Marion, for the appellant.

R. M. Hamer, and H. E. Ganse, both of Emporia, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: In a complaint filed by Blanche Carmons, she charged Robert L. Woods with the paternity of her child. A trial before a jury was had, and a finding was made by the jury and approved by the court that the defendant was not the father of the bastard child.

On appeal complaint is made of an instruction that—

"The law presumes morality and uprightness until the contrary is made to appear from the evidence, and you are instructed that defendant in this case is presumed to be innocent of the charge made against him and that presumption remains with him through all stages of the trial and until overcome by the evidence of the state by a preponderance of the credible evidence."

It is contended that, as the proceedings in a prosecution for bastardy are governed by rules regulating civil actions, there was no room for a presumption of innocence or good conduct, nor any justification for giving the instruction. In civil actions for wrong or fraud the party charged may ordinarily rest on the presumption of good faith and good conduct until something to the contrary is shown. In *Baughman, Sheriff, v. Penn*, 33 Kan. 504, 6 Pac. 890, it was held that "the law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose." (p. 508.) Where it was claimed that a railroad company had wrongfully built a railroad through the Indian Territory without right or license, it was held that there is no presumption that a party is a wrongdoer, but, in the absence of a contrary showing, the presumption is the reverse of that. (*Speer v. M. K. & T. Rly. Co.*, 23 Kan. 571.) In an action to recover on a promissory note properly indorsed the law presumes, in the absence of evidence to the contrary, that the holder has acquired it honestly, and that it was transferred to him before due and for value. (*Ecton v. Harlan*, 20 Kan. 452.) Many other cases might be cited to the effect that honesty and good conduct are to be presumed, both as to public officers and private persons, where there is no evidence to the contrary. In ordinary negligence cases the rule is that the burden is upon the plaintiff to prove the negligence alleged, which is only a negative expression of the rule that the de-

fendant is presumed to be free from negligence until a showing to the contrary is made. However, we have an authority more directly in point than any of those cited. In a bastardy proceeding it was said:

"The law presumes morality and uprightness of conduct until the contrary is established, and it is not error to instruct the jury trying an action for bastardy, in which the defendant denies the charge, that the defendant is presumed to be innocent until it has been proven to the satisfaction of the jury by a preponderance of the evidence that he is the father of the relatrix's child." (*The State, ex rel., v. Creager*, 97 Kan. 334, syl. ¶ 3, 155 Pac. 29.)

The similarity of the language used in the instruction in question indicates that this authority was before the court when the instruction was written, and it is clear that no error was committed in the giving of the instruction.

It is also insisted that the jury ignored the evidence given in behalf of the relatrix, and, therefore, the verdict should have been set aside. She gave testimony tending to show acts of intimacy with the defendant, and that he was the father of her child. Other testimony was given of admissions made by him to the same effect, but the jury appears to have deemed the evidence to be incredible. The defendant did not testify, and the only evidence offered in his behalf was to the effect that the period of gestation is ordinarily 280 days, whereas the child of the relatrix was born 261 days from the time of the alleged intercourse. It is insisted that as the testimony of the relatrix was not contradicted by the defendant, nor directly disputed by other testimony, the verdict should have been set aside by the court. There was little opposing testimony, but the jury were not required to accredit testimony which they deemed to be unworthy of belief. In its instructions the court properly advised the jury, as is usually done, to the effect that if they believed any witness had willfully testified falsely, they might disregard all of the testimony of the witness or so much of it as they believed to be untrue, and that this rule applied to witnesses whose testimony was not contradicted by that of the other witnesses. Of course, jurors are not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but should carefully and candidly give effect to that which is credible. No fixed rule can be laid down as to the test of credibility. It is a question for the jury to consider,

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and it has been decided that, although witnesses are not contradicted, a jury may discard their testimony, if they honestly regard it to be unreliable. In *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. 817, where strong evidence had been offered in support of an affirmative defense on which the court had directed a verdict, it was held that, the burden of proving the defense being upon the defendant, "it cannot be said, as a matter of law, that the jury were bound to accept the evidence as true, even if not contradicted." (p. 497.) In *Cobe v. Coughlin*, 83 Kan. 522, 112 Pac. 115, where it was insisted that there was no opposing testimony and the court should direct a verdict, it was said that "a court or jury is not required to accept a statement of a witness as conclusive, although there may be no direct evidence contradicting his statements, and hence the court could not direct the verdict." (p. 525.) In *Howell v. Harper*, 86 Kan. 396, 121 Pac. 362, it was remarked that "it does not necessarily follow that a fact is established because testimony fairly tending to prove it is uncontradicted by direct opposing testimony. It cannot be said, as matter of law, that the jury (or court trying the facts) is bound to accept the evidence as true, although not contradicted by direct evidence." (p. 397.) (See, also, *Harrod v. Latham*, 77 Kan. 466, 95 Pac. 11; *Saindon v. Morrell*, 78 Kan. 53, 95 Pac. 1056; *Fisk v. Neptune*, 96 Kan. 16, 149 Pac. 692; *Wyrick v. Street Railway Co.*, 100 Kan. 122, 163 Pac. 1059.)

The court that watched the course of the trial and the appearance of the witnesses denied the motion of relatrix to give judgment against the defendant notwithstanding the verdict of the jury, and also overruled her motion for a new trial based upon the ground that the verdict was contrary to the evidence. No attack is made upon the jury and their conduct, other than that they did not credit testimony offered in behalf of the relatrix. Under the authorities cited, we cannot interfere with the approved finding of the jury and, therefore, the judgment is affirmed.

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No. 21,468.

THE STATE OF KANSAS, *Appellee*, v. WILLIAM T. WELLMAN,  
*Appellant*.

## SYLLABUS BY THE COURT.

1. **EXTRADITION—*Nonsupport of Child—Absence of Accused from State—Jurisdiction of Kansas Courts.*** Although the federal law does not provide for the surrender by a state as a fugitive from justice of one who has violated the criminal laws of another state without having been present therein, and although in the absence of state legislation no authority exists for such surrender, nevertheless, where, in the absence of any local statute, a person is surrendered by one state to another as a fugitive from justice, the fact that the accused had not been in the demanding state at the time of the alleged offense, or since then, does not deprive its courts of jurisdiction to try him therefor, nor does it show such an abuse of process as to warrant the dismissal of the case against him.
2. **SAME.** A person who has never been in this state may, under some circumstances, be rightfully convicted here of a violation of the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his children under the age of sixteen years, who are in destitute circumstances.
3. **DIVORCE—*Deserted Child in Kansas—Husband in Missouri—Jurisdiction of Kansas Courts.*** Where by the misconduct of a husband and father in another state his wife and children are compelled to leave him, and they come to Kansas, and where in an action in which personal service has been had upon him she obtains a divorce and a decree awarding her the custody of the children, and requiring him to make periodical payments for their support, he may thereafter, while in another state, be guilty of a violation of the statute referred to, by failing to provide in any way for the children, notwithstanding that they were brought into this state without his knowledge or consent.
4. **CRIMINAL LAW—*New Trial—Evidence Must be Produced on Motion.*** The provision of the civil code that, in order to preserve for review a ruling excluding evidence, the evidence must be produced at the hearing of the motion for a new trial, applies as well in criminal cases, inasmuch as the criminal code makes such a ruling, if erroneous, a ground of new trial only by the adoption of the civil procedure in relation thereto.
5. **TRIAL—*Statement of Trial Judge Nonprejudicial.*** A statement by the trial judge held not to be shown to have been prejudicial to the defendant.
6. **NONSUPPORT OF CHILD—*Child Cared for by Others—No Defense of Parent.*** In a prosecution under the statute making it a criminal

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offense for a parent to neglect or refuse, without lawful excuse, to provide for the support of his children in destitute or necessitous circumstances, it is not a defense for a father upon whom rested the duty of providing such support to show that the necessities of the children were relieved by the interposition of others.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed February 9, 1918. Affirmed.

*M. A. Gorrill*, and *Henry H. Asher*, both of Lawrence, for the appellant.

*S. M. Brewster*, attorney-general, *J. B. Wilson*, county attorney, and *J. H. Mitchell*, of Lawrence, for the appellee.

The opinion of the court was delivered by

MASON, J.: William T. Wellman appeals from a conviction on the charge of having violated the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support and maintenance of his child under the age of sixteen years, who is in destitute or necessitous circumstances.

The period within which the defendant is charged to have been guilty of such omission extended from November 10, 1916, to February 10, 1917. During that time and until after his arrest he was not in the state of Kansas, but was living in Kansas City, Mo., and his three children were with their mother—his divorced wife—in Lawrence, Kan. His arrest was made under color of the federal law respecting the interstate rendition of fugitives from justice, the governor of Kansas having made a requisition upon which the governor of Missouri issued a warrant, under which he was arrested and turned over to the Kansas officials.

1. The defendant maintains that the district court acted without jurisdiction because, not having been in this state at the time of the alleged commission of the offense charged, he was not a fugitive from justice, and therefore was not within the provisions of the federal statute referred to. In this contention, so far as relates to the regularity of the arrest, he is borne out by the authorities. The rule invoked results in the unfortunate and anomalous possibility that a murderer standing in North Carolina (for instance) may shoot and kill a man

just over the line in Tennessee, and escape conviction in the former state on the ground that he had committed no crime within its jurisdiction (*State v. Hall*, 114 N. C. 909), and avoid prosecution in the latter because, not being a fugitive from justice, he is not amenable to interstate rendition. (*State v. Hall*, 115 N. C. 811; 11 R. C. L. 731; 3 Fed. Stat. Ann., 2d ed., 288, 289; 19 Cyc. 87.) It has been determined that in order to be regarded as a fugitive from justice within the meaning of the federal act the accused need not have left the state where the offense is alleged to have been committed, for the purpose of avoiding arrest. (19 Cyc. 87; 11 R. C. L. 732.) Inasmuch as it has been decided that a person may be treated as a fugitive from justice "no matter for what purpose or with what motive, nor under what belief" he left the demanding state (*Appleyard v. Massachusetts*, 203 U. S. 222, 227), even although it was with the knowledge and consent of, and without objection by, the public prosecutor, after the dismissal of one indictment for the same offense (*Bassing v. Cady*, 208 U. S. 386), it would seem that by similar reasoning, and perhaps on the theory of a constructive presence in a state where a crime resulted from his act (dissenting opinion, *State v. Hall*, 115 N. C. 811, 820), it might have been held also that a person could under exceptional circumstances be regarded as a fugitive from justice even with respect to a state whose boundaries he had never physically crossed. But that is a federal question and has been decided to the contrary by the court of last resort. (*Hyatt v. Corkran*, 188 U. S. 691, 712, 713.)

Granting, however, that the governor of Missouri was not required by the federal statute to issue a warrant for the arrest of the defendant, that there was no statutory authority for the issuance of such warrant, and that he might have been discharged upon a writ of habeas corpus if he had sought that relief before being brought into this state, it does not follow that there is any defect in the jurisdiction of the court by which he has been tried and convicted, or that he can now derive any advantage from the fact that his presence here is not due to his own consent or to any process of law valid in Missouri. No right within the protection of the federal government is invaded by the method by which the defendant's presence was procured. (*Pettibone v. Nichols*, 203 U. S. 192.)



While the federal statute does not impose a duty upon the governor of a state to recognize a requisition for the delivery of a person who is accused of an offense committed while he was not personally within the state whose laws he is charged with breaking, there would seem to be no legal obstacle to a state's providing by statute for the surrender of a person within its jurisdiction to a state whose laws he is accused of violating while not physically within its borders, although without such legislation no authority therefor exists. (19 Cyc. 85; 11 R. C. L. 732; *Innes v. Tobin*, 240 U. S. 127.) But where, without such enactment, a voluntary surrender is made, the want of statutory authority for the arrest does not defeat the jurisdiction of the court before which the accused is brought. Even a forcible abduction from another state is generally regarded as not having that effect. (19 Cyc. 99; 12 L. R. A., n. s., 225; 15 L. R. A. 177.) The conclusion that the want of statutory authority to bring the defendant in this case from Missouri into Kansas does not prevent his trial and punishment after he has been lodged in custody here, as the result of his surrender by the Missouri authorities, results logically from the decision of this court in *In re Flack*, 88 Kan. 616, 129 Pac. 541. It had originally been held, in compliance with what was then believed to be the federal rule, that a person brought into this state from another by interstate rendition could not be tried here upon any other charge than that on which the process was based. (*The State v. Hall*, 40 Kan. 338, 19 Pac. 918.) After the supreme court of the United States had held that no federal right would be violated by such a course (*Lascelles v. Georgia*, 148 U. S. 537), the way was still open for this court to refuse to countenance the holding of the accused upon any new charge. The decision rendered, however, was that the defendant might be tried upon other charges than those on which his arrest was made, and thereby the court repudiated the theory that the right of the public to inquire into the guilt of an accused person, and to punish him if he was found to have violated its laws, depends upon the regularity of the method by which his presence in the state was brought about. Whether a state shall surrender a person within its jurisdiction who is accused of having broken the criminal laws of another state, without having been personally present therein, is

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a matter of its own domestic policy. If, without a statute on the subject, its courts hold such course to be legal, the correctness of the decision could not be a matter of inquiry elsewhere; and if, without a judicial decision, the executive officers assume that such conduct is proper and act upon the assumption, the person surrendered has no just ground of complaint against the authorities of the state whose laws he has broken—certainly none which ought to entitle him to escape punishment for his offense. Where evidence has been obtained by an invasion of the defendant's legal rights it is not necessarily rendered inadmissible against him. (*The State v. Turner*, 82 Kan. 787, 109 Pac. 654.) And where a nonresident of the state has broken its criminal laws, its right to punish him ought not to be dependent on the regularity of the proceedings by which he was surrendered to its officials. In *In re Moyer*, 12 Idaho, 250 (affirmed in *Morey v. Whitney*, U. S. 222), the authorities on the subject are collected, and the grounds of this view are well stated in this language:

"We are of the opinion that after the prisoner is within the jurisdiction of the demanding state, and is there applying to its courts for relief, he cannot raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal constitution, and the act of Congress. A careful and diligent examination of the many authorities touching upon this subject, and the reasons that exist for invoking the aid of the writ in such cases, convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case, and does not involve the inquiry as to whether or not he is in fact guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws of which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased and can no longer have any application. . . . The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes *functus officio*, so soon as the prisoner is delivered into the jurisdiction of the demanding state, and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state. . . . One who commits a crime against the laws of the state, whether committed by him while in person

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on its soil or absent in a foreign jurisdiction, and acting through some other agency or medium, has no vested right of asylum in a sister state [citing cases], and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state, and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he himself should not answer the charge against him when brought before the proper tribunal." (pp. 255, 256, 257.)

We do not regard the conclusions stated as in conflict with what is decided in *The State v. Simmons*, 39 Kan. 262, 18 Pac. 177. That was a proceeding in contempt against two persons for their failure to appear as witnesses in response to a subpoena. An attachment was issued against them on which a Kansas sheriff arrested them in Nebraska and brought them in irons into this state, where they were adjudged guilty of contempt. On appeal, the judgment was reversed because of the unlawful means used to bring them before the court. The jurisdiction of a district court to try a person on a charge of having committed a public offense does not depend upon how he came to be in this state. These might, however, in a particular case, be such oppression and want of fair dealing in the matter as to justify a dismissal of the case. But we do not think such course is required by the fact that the defendant has been surrendered by the authorities of another state without the existence of any statute requiring such action on their part.

2. The defendant also insists that the statute on which the prosecution is based does not apply to him, because of his absence from the state at the time of the commission of the alleged offense. He argues that while it is possible for one who is outside of the state to violate its criminal laws, this can only result under the conditions named in the statute which reads:

"Every person being without the state, committing or consummating an offense by an agent or means within the state, is liable to be punished by the laws thereof in the same manner as if he were present and had commenced and consummated the offense within the state." (Gen. Stat. 1915, § 7930.)

This statute is but declaratory of the common law. (12 Cyc. 208; 8 R. C. L. 101.) It does not purport to enumerate all the conditions under which a person absent from the state may become an offender against its punitive laws. If the failure of a

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parent who is outside of the state to take any action at all, with respect to a child who is in the state, and to whom he owes an affirmative duty, is not to be regarded as consummating an offense by an agent or means within the state, and therefore not within the purview of the statute quoted, it does not follow that he is not amenable to the law here invoked. The section under which the prosecution is brought reads as follows :

"Any parent who shall, without lawful excuse, desert or neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and, on conviction thereof, shall be punished by imprisonment in the reformatory, or penitentiary, at hard labor, not exceeding two years." (Gen. Stat. 1915, § 3410.)

The offense here created is essentially one of omission, and the aid of supplementary legislation is not needed to bring a person who is outside of the state within its condemnation.

"Such an offense as desertion or failure to provide for a wife or children is however negative, the omission of a duty, and therefore venue depends on the question where the omission to perform that duty occurs; and where the husband abandons his family and they become destitute, he owes the duty of support at the place of their residence and nowhere else; accordingly, it is usually held that the breach of duty occurs there and the venue should be laid there." (8 R. C. L. 310.)

"While a statute has no extra-territorial force, and one cannot be indicted here for what he does in a foreign country, the making of a contract in a foreign country may, as in this case, create a condition operative in this country, under which acts of omission or commission can be punished here." (Head note, *United States v. Nord Deutscher Lloyd*, 223 U. S. 512.)

This question has already been determined by this court against the defendant (*In re Fowles*, 89 Kan. 430, 131 Pac. 598); and the argument in his behalf amounts to a request to review that decision. We are satisfied with the law as there declared and adhere to the conclusion already reached.

3. The evidence of the state tended to show these facts: The defendant and his wife were married in Kentucky, and later moved to Lawrence, where they resided for some years. In 1911 they moved to Kansas City, Mo. About June 20, 1913, his wife, because of his ill treatment, left him, and with their children came to Lawrence, presumably without his knowledge or consent. In February, 1916, she there obtained a divorce in an action in which personal service had been made upon the

defendant, and was awarded the custody of the children, the defendant being directed to pay a fixed sum each month for their support. From November 1, 1916, to February, 1917, he was earning about \$25 a week, but contributed nothing to the support of the children.

The defendant maintains that the fact that his wife brought the children from Missouri to Kansas without his knowledge or consent is fatal to the conviction. The cases bearing on the effect of nonresidence of the defendant upon the enforcement of laws making the desertion or nonsupport of a wife or family a crime, are collected and classified in a note to *The State v. Gillmore*, 88 Kan. 835, 129 Pac. 1123, in 47 L. R. A., n. s., 218. In the note it is said:

"Where the wife after her abandonment removes to another jurisdiction voluntarily and without the husband's consent, the general rule as stated above [holding the husband criminally liable at the wife's residence] will usually not apply, especially in simple abandonment cases, for in such cases it is generally held that the offense is complete where the abandonment takes place, and the wife cannot, by taking up her residence elsewhere, confer jurisdiction upon another court to punish the husband for that offense." (p. 222.)

Two of the New York cases cited under the subdivision relating to removals from one county to another (*People ex rel. Drake v. Bergen*, 36 Hun, [N. Y.] 241, and *People v. Vitan*, 10 N. Y. Sup. 909) arose under statutes relating to abandonment, and proceeded on the theory above indicated—that the offense is not continuous, but is completed when the husband has left his wife, and that her subsequent residence cannot affect the matter. That doctrine manifestly can have no application to cases arising under statutes like our own, which make nonsupport, as well as desertion, a distinct ground of prosecution. In a third New York case it was held, under a different statute, that where a husband and wife had separated by agreement, he was criminally liable for nonsupport in a jurisdiction into which she had subsequently moved. (*People v. Meyer*, 33 N. Y. Sup. 1123.) The remaining case referred to in this subdivision holds that, under a statute similar to our own, a husband whose misconduct has compelled his wife to leave him can thereafter be prosecuted for her nonsupport only in the county in which he resided—not in the one into which she has removed. (*State ex rel. Delevan v. Justus*, 85 Minn. 114.)

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Perhaps as between two counties of the same state that rule may be justifiable. For reasons to be hereafter stated we do not think it so as between different states. Three additional cases are cited in the note, bearing upon the interstate phase of the matter. One of them (*People v. Clairmont*, 111 N. Y. Sup. 613) turns on the fact that in a special proceeding against his property the defendant had had no opportunity to be heard; another (*State v. Shuey*, 101 Mo. App. 438) upon the completeness of the offense of abandonment, nonsupport as a separate offense not being involved; and the third (*The City v. Bailey*, 8 Phila. 485) upon that principle combined with the rule, which is not recognized in this state, that a wife cannot under any circumstances acquire a domicile separate from that of her husband. It is therefore clear that outside of the Minnesota case none of those referred to has any close bearing upon the question here involved.

We think that whether the defendant is answerable to the Kansas courts depends upon whether he owed this state a duty to support his children while they were here with their mother. Although he was divorced from her, they were still his children and, except for special circumstances, he was under an obligation to support them. If they had been wrongfully taken by her from his home, where he was ready to care for them, doubtless he would owe no duty to provide for them at the place where she detained them. The statute covers such a situation by penalizing nonsupport only when it is "without lawful excuse." But if through the misconduct of the defendant it became necessary for the mother to remove them from his control he would not be thereby relieved from his obligation to provide for them. What the fact was in this regard was one of the matters involved in the determination of his guilt or innocence. It was shown, however, that in an action to which he was a party, and in which personal jurisdiction over him had been acquired by the service of summons, the district court of Douglas county had awarded the custody of the children to his divorced wife on the ground that he was not a fit person to care for them, and had specifically charged him with the duty of providing for their support. Whatever might have been the situation otherwise, the decree of the court afforded a basis for a finding that the defendant was under a legal duty to provide

for them while they were with their mother in this state. The omission to perform this duty occurred here. The defendant is not being prosecuted for any wrongful behavior which resulted in his wife and children leaving him; such misconduct, if it occurred, could not be a violation of a Kansas statute, but might bring about a condition under which the defendant was under an affirmative obligation to act, and by merely remaining passive might become a violator of our laws. He is under prosecution for his disobedience of the statute, which took place between November 10, 1916, and February 10, 1917, by his then neglecting and refusing to provide for the support of his children. If he had sent his wife and children into Kansas, it would hardly be doubted that he became responsible for their care here. If as a result of his wrongdoing they were obliged to leave him and seek refuge elsewhere, the circumstance that they found shelter in a state which undertakes to punish the neglect of parental duty under such circumstances, when they might have chosen one having a different policy in that regard, imposes upon him no hardship of which he has any standing to complain. Their being here was not due to his deliberate choice, but, according to the state's theory, it was the result of his voluntary misconduct.

4. Complaint is made of the exclusion of evidence, but at the hearing of the motion for a new trial it was not produced. The section of the criminal code enumerating grounds for the granting of a new trial does not refer to the rejection of evidence. (Gen. Stat. 1915, § 8191.) Such a ruling is available in support of a motion for a new trial in a criminal case only by virtue of the provision making the procedure of the civil code applicable thereto. (Gen. Stat. 1915, § 8124; *The State v. Keleher*, 74 Kan. 631, 87 Pac. 738.) The provision of the civil code requiring excluded evidence to be produced at the hearing of a motion for a new trial, if it is to be relied upon (Gen. Stat. 1915, § 7209), therefore applies here and the ruling complained of is not reviewable.

5. At the trial the defendant asked to introduce the record of the decree in the divorce case. An objection to it was sustained, the court saying that if the defendant wanted the jury to know about the order he would state that it was made because the court believed the defendant was in fault and was

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not a suitable and proper person to have the custody of the children. The purpose of the introduction of the evidence was said to be to show that the defendant could not interfere with the custody of the children. The statement of the court seems to have answered that purpose. It is argued that the episode, in view of the manner of the trial judge, tended to lead the jury to feel that he was hostile to the defendant, but we do not regard the record as showing that to have been the case.

6. Complaint is made of an instruction to the effect that the children should be deemed to be in destitute or necessitous circumstances within the provisions of the statute, so far as the defendant was concerned, if they would have been in such condition if they had not been provided for by some one else—that it would be no defense to show that their necessities had been relieved by others. This is in accordance with the law as declared in *The State v. Waller*, 90 Kan. 829, 136 Pac. 215.

Objections made to other rulings either relate to the effect of the evidence, as to which the verdict must be regarded as final, or present the same legal questions as those already discussed.

The judgment is affirmed. .

DAWSON, J., dissents.

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No. 21,505.

UNION PACIFIC RAILROAD COMPANY, *Appellee*, v. WAYNE J. DAVENPORT, ADOLPH FICK and OALUS GROSSFIELD, *Appellants*.

SYLLABUS BY THE COURT.

**PUBLIC LANDS—Congressional Grant—Railroad Right of Way—Vested Title—Adverse Possession.** The Union Pacific Railroad Company, by the grant to its predecessors in interest under the act of congress of July 1, 1862 (12 U. S. Stat. at Large, ch. 120, p. 489), and the amendatory act of July 2, 1864 (13 U. S. Stat. at Large, ch. 216, p. 356), became the owner in fee of a right of way two hundred feet from the center of the track, which right is superior to claims initiated after the act of 1864, and is not defeated by adverse possession. The grant is of the land itself and not a mere right of passage over it.

Appeal from Gove district court; JACOB C. RUPPENTHAL, judge. Opinion filed February 9, 1918. Affirmed.

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*A. D. Gilkeson*, of Hays, for the appellants.

*R. W. Blair*, *T. M. Lillard*, and *A. M. Hambleton*, all of Topeka, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff brought this suit to recover possession of the outer one hundred and fifty feet of its right of way on each side of its track through the lands of the defendants. It recovered judgment, and the defendants appeal.

The petition pleaded the various acts of congress granting to the Leavenworth, Pawnee & Western Railroad Company, a right of way 400 feet wide, being 200 feet on each side of its tracks through the lands in question and other lands, and the facts showing that the plaintiff is the successor in interest of the original grantee of the right of way. The answer alleged that defendants are the owners in fee simple of the lands in controversy and have been in the open, notorious, and exclusive possession thereof for many years. The case was tried on an agreed statement of facts, and the court found the facts and made conclusions of law. The essential facts are that all the lands involved were public lands and unpatented on July 2, 1864, at the time of the passage of the act of congress amendatory to the act of July 1, 1862, granting the right of way to the plaintiff's predecessor in interest. The defendants are the owners of the tracts in controversy, under patent titles from the United States. The Union Pacific Railroad Company has fenced 100 feet of its right of way, and the defendants, for more than fifteen years past, have used the outer 150-foot strip for farming purposes in the same manner they have used the other portions of their tracts. On June 24, 1912, congress passed an act entitled:

"An act legalizing certain conveyances heretofore made by the Union Pacific Railroad Company."

The act contains a provision—

"That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation[s], or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the

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lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way." (Part 1, 37 U. S. Stat. at L., ch. 181, p. 138.)

Upon the passage of this act the plaintiff started in to take actual and exclusive possession of the entire width of 400 feet of right of way, and the defendants refused to surrender possession of the outer 150-foot strip of land on each side of the track. As conclusions of law, the court held that by the use of such strips for agricultural purposes and grazing the defendants gained no permanent rights adverse to the plaintiff prior to the bringing of the action.

The court further held that,

"At times and places the plaintiff does not have actual use and need of the immediate and present use of the entire 400 feet of the right of way, for the operation of its railroad, but it must remain the judge as to how much of a strip it needs from time to time, and at what places along its railroad, and to what extent as to time and place it may permit a part of its right of way of 400 feet to be used for agricultural purposes, if under the grant by congress any right at all is possessed by any one to use any part of the right of way for any purpose not directly connected with the business and operation of the railroad."

Among the reasons for so holding, the court found that—

"No court can say as to any particular strip or part of the right of way, that the time will never come when the whole 400 feet at a given point on the railroad will be needed for some proper purpose in connection with the operation of the railroad."

The court further found that it is not necessary, in order to hold the right of way to its full width of 400 feet, that plaintiff should occupy all the strip "with rails, ties, cuts or fills, buildings or structures or camps," or materials awaiting use on the railroad, or that it should break the surface of the earth and use all or parts thereof for fills and ballast or otherwise.

The sole question involved is: Who is entitled to the possession and use of these strips of land? The defendants contend that the grant under the acts of congress is merely an easement; that whenever it is not in actual use for the purposes of a right of way, the possession and use thereof vest in the owner of the fee, and that if it were abandoned by the company it would become a part of the fee. It is urged that before the company can recover possession it must show that the entire portion of the 150-foot strip of land on each side of its fences

is necessary for railway purposes; and that because the railway company has offered to lease the use of the land to the defendants until such time as it should become necessary for railway purposes, it has virtually shown an abandonment of all the land in controversy, and that the right to the exclusive, continuous use and possession thereof can only be obtained by actual use for railway purposes.

The question is not a new one, and no useful purpose would be served by reviewing at length the authorities which completely answer the contentions raised by the defendants. In *Railway Co. v. Watson*, 74 Kan. 494, 87 Pac. 687, which involved a similar grant, it was held that the railway company acquired a right of way 200 feet wide through the Osage Ceded Lands in this state, and that the act of congress granting the right of way "was an absolute grant *in præsentia*, vesting title from the date of the passage of the act, and all persons subsequently purchasing any of such lands did so subject to, and with notice of, the railroad company's rights." (Syl. ¶ 1.) It was also held that, "Private individuals cannot acquire title by adverse possession to any portion of the right of way named." (Syl. ¶ 3.) In that case, the district court made a finding to the effect that the railway company had abandoned all claim to that part of its right of way lying more than 50 feet from the center of its track, and that defendant had become the owner thereof by adverse possession. This court held that the facts found by the trial court were insufficient to divest plaintiff of its title and right of possession, citing *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, where it was said:

"In determining whether an individual, for private purposes may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in *Packer v. Bird*, 137 U. S. 661, 669, and approvingly referred to in *Shively v. Bowlby*, 152 U. S. 1, 44, [p. 270]." (p. 511).

Subsequently the supreme court of the United States, in *Stuart v. Union Pacific R. R. Co.*, 227 U. S. 342, rendered a decision involving the questions raised here, and held that—

"Under the acts of 1862 and 1864 the Kansas Pacific Railway Company [of which the plaintiff is successor in interest] had authority to build west of the one hundredth meridian to Denver and was entitled to

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a right of way two hundred feet from the center of the track, and that right is superior to claims initiated after the act of 1864, even if prior to the construction of the road; and this right is not defeated by adverse possession." (Syl.)

In *Railway Co. v. Watson*, supra, the court disapproved a statement in the opinion in *U. P. Rly. Co. v. Kindred*, 43 Kan. 134, 23 Pac. 112, wherein it was said that the railway company got only an easement and did not own the fee. Referring to the *Kindred* case it was said:

"The term 'easement' was not, perhaps, strictly accurate. The estate granted to the Union Pacific company is corporeal in character rather than incorporeal, and corresponds to the limited fee for particular uses, subject to reverter, described in the *Townsend* case." (p. 518.)

Among other decisions holding that the land itself, and not, technically speaking, a "right of way," was granted by similar acts of congress, are *Missouri, Kansas & Texas R'y Co. v. Roberts*, 152 U. S. 114; *New Mexico v. United States Trust Co.*, 172 U. S. 171. In the latter case, referring to the character of the grant, it was said:

"That is, the land itself—not a right of passage over it. So this court in *Missouri, Kansas & Texas Railway v. Roberts*, 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee." (p. 182.)

The act of congress cannot be given the same construction as a warranty deed conveying a strip of land to a railroad company for right of way, as held in *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208; nor can it be construed by the rules of construction applied by state courts to condemnation proceedings under statutes of a state, or to grants for railway purposes by a state.

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants." (*Shively v. Bowlby*, 152 U. S. 1, 44.)

As said in *Railway Co. v. Watson*, supra,

"The decision of this court must therefore be controlled by the views of the supreme court of the United States respecting the nature of congressional grants of the character of the one in question." (p. 511.)

The judgment is affirmed.

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DAWSON, J. (concurring specially): I concur in the opinion and judgment for the simple reason that the supreme court of the United States has held squarely and repeatedly that the lands granted by congress to the Pacific railroads for railway rights of way are not subject to alienation by adverse possession or otherwise, but must be retained by the railroads for railway purposes as the gradually expanding needs of the railroads may require. And when, pursuant to popular agitation on this subject a few years ago, congress considered this matter, it found that the best it could do was to permit the various state laws relating to adverse possession to operate in the future, but not retroactively, and that those parts of the rights of way not yet occupied for railway purposes could not arbitrarily be taken from the railroads and gratuitously conferred upon the adjacent land-owners who had so long occupied these lands and treated them as their own.

I am authorized to say that Mr. Justice WEST and Mr. Justice MARSHALL join in this special concurrence.

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No. 21,514.

WILLIAM SMITH, *Appellee*, v. THE CITY OF KANSAS CITY, *Appellant*.

SYLLABUS BY THE COURT.

COMPENSATION ACT—*Personal Injuries*—*Written Release*—*Mutual Mistake*. The paper relied on as a release appears to have been signed when the parties were mutually mistaken as to the extent of plaintiff's injuries. The sum therein named being manifestly inadequate, such instrument is not binding.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed February 9, 1918. Affirmed.

*E. S. McAnany, M. L. Alden, Thomas M. Van Cleave*, all of Kansas City, and *Frank L. Barry*, of Kansas City, Mo., for the appellant; *Samuel Maher*, of Kansas City, of counsel.

*W. W. McCanles, Charles E. Thompson, and H. F. Gorsuch*, all of Kansas City, for the appellee.

The opinion of the court was delivered by

WEST, J.: The city appeals from a judgment recovered by the plaintiff for damages caused by being trampled while in the employ of the city caring for horses used in connection with its fire department. He alleged that he was 65 years old and was making \$2 a day. The injury was on February 15, 1916, and on the 24th of March, thereafter, he drew \$33.75 and signed a paper called a final receipt, for which he alleges there was no consideration, as the amount paid him was only a part of the compensation due. He also pleaded inadequacy, fraud, and mutual mistake. The jury were charged that the only ground upon which the release could be set aside was that of mutual mistake as to the extent of his injuries, and gross inadequacy. The verdict was for \$590.25. The plaintiff is an unlettered man and spent 30 years of his life with Barnum's circus. He testified to receiving injuries on the legs, and a rupture, and also injury in the back; that he wore a bandage on one leg for three or four weeks; that he was in bed off and on for ten or twelve days, then 'got up on crutches and walked around; that he attempted to do work at other places and had been discharged for physical inability; that the city doctor came to see him, did nothing for one leg, and bandaged the other "and put a little splinter on it," and said he would be up in two or three days. Eleven or twelve days thereafter he sent for another doctor, whom he saw several times. This doctor advised him not to do any work until he got better. He twice saw still another doctor who gave him some medicine and, like the one just mentioned, told him he was ruptured. He went to numerous other physicians, but appears, nevertheless, to have taken charge of his own case to quite an extent. He testified that he was told to go over and draw his wages, which he supposed he was doing when he signed the paper. At the time of trial he testified that he had not done anything for five or six months until the preceding week. He seems to have tried to work at numerous places, but failed on account of his inability to perform the required tasks. When he signed the paper he had not attempted to do any work, and did not know what effect his injury would have upon his ability to work. The superintendent of the waterworks testified that he went to

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see the plaintiff about ten days after the injury and later, when he came to the city hall, that he gave him the address of Mr. Barry, an attorney in Kansas City, Mo., who was representing the city; that the plaintiff thought he would be able to go back to work the following Monday morning. The paper recites the payment of \$33.75—

"Said amount being such part of my weekly wages for the period of four and one-half weeks from the 23d day of February, 1916, to the 25th day of March, 1916 (both dates included) as I am entitled to, and making in all with the weekly payments already received by me, the total sum of Thirty-three and 75/100 Dollars (\$33.75) such payment being the final payment of compensation under the WORKMEN'S COMPENSATION LAW OF KANSAS."

It recites the release and discharge of all claims and demands, past, present, and future. Mr. Barry testified:

"Q. \$15.00 a week and you allowed him seven dollars and a half a week? A. Yes, sir.

"Q. It had then been four and one-half weeks that he had been off? A. No; for four and one-half weeks which would have been up to the day he said he was going to return to work.

"Q. Well, we will assume you figured it will be four and one-half weeks, then he would actually be entitled to \$33.75 up to the date he went to work? A. Well, you can figure it.

"Q. You gave him what he was entitled to? A. Under the law I gave just what that says.

"Q. You gave him just what he was entitled to up to the day he was going to work? A. Yes, sir.

"Q. Then you took the release from him for the rest of the eight years, did n't you? A. No, sir; I did n't.

"Q. In addition to what he was entitled to you took a release of this? A. I took that document, whatever you have in your hand, and it will speak for itself."

Enough of the evidence has been recited to show that at the time the paper was signed the plaintiff thought he would be able to go to work again for the city. It is apparent from Mr. Barry's testimony that he thought likewise and intended by the use of the instrument in question to foreclose any further claim for the injury already sustained. Acting in good faith, as he seems to have done, it is but natural to assume that both he and the plaintiff believed that the material results of the

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injury had disappeared, and that no substantial difficulty on account thereof would thereafter arise in plaintiff's doing his former work. It is not only fair, but reasonably clear, therefore, that both parties were acting under a misapprehension of a real condition—in other words, were mutually mistaken—and it must go without saying that in view of the real condition the amount paid was, beyond all question, inadequate. No reason in equity or in law appears why the mistake should not be corrected and the real injury be compensated for. Of course, there is the usual dispute as to the extent of the injury, and the usual conflict in the medical evidence, but these things were for the jury, and there appears in the record sufficient basis for their conclusions.

The judgment is affirmed.

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No. 21,572.

EMMA M. TROWBRIDGE, *Appellee*, v. WILSON & COMPANY,  
*Appellant*.

SYLLABUS BY THE COURT.

WORKMEN'S COMPENSATION ACT—*Pain from Injuries Received—Right to Compensation Therefor*. Under the workmen's compensation act, compensation can be recovered where inability to labor is caused by pain resulting from an injury received in an accident arising out of and in the course of the employment.

Appeal from Wyandotte district court, division No. 2; FRANK D. HUTCHINGS, judge. Opinion filed February 9, 1918. Affirmed.

J. E. McFadden, O. Q. Claflin, both of Kansas City, and O. C. Mosman, of Kansas City, Mo., for the appellant.

W. W. McCanles, Charles E. Thompson, and H. F. Gorsuch, all of Kansas City, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: Under the workmen's compensation act, the plaintiff recovered judgment for \$636 for four weeks' total incapacity for labor, and 208 weeks' partial incapacity. The defendant appeals. The defendant complains—



"Of the action of the trial court in admitting and excluding evidence, in refusing to give the instruction requested by appellant, the giving of instruction Number One of the instructions given by the court, of the action of the trial court in overruling defendant's motion for a new trial and overruling defendant's motion to set aside the special findings of the jury, and in entering judgment in favor of the plaintiff and against the defendant."

In opening its argument, the defendant says:

"The error of the court in admitting and excluding evidence, in refusing to give the instruction requested by defendant and in giving instruction Number One of the instructions given by the court all involve the action of the trial court in allowing the pain and suffering claimed by the plaintiff to enter into this case and be considered by the jury as affecting plaintiff's recovery, and will, therefore, be considered jointly."

In her petition, the plaintiff alleged that because of the injuries sustained by her, she was unable to work for more than a month, and will for all time suffer such pain that she will never again be able to work and earn wages as before. There was evidence to show that the injury was painful, and that the pain prevented the plaintiff from working.

In the first instruction, in stating the case to the jury, the court said:

"Plaintiff in her petition alleges in substance that . . . the plaintiff was laid off from work for more than a month, and will for all time suffer such pain that she will never again be able to work and earn wages as before."

The defendant asked the court to give the following instruction:

"You are instructed that the plaintiff is not entitled to recover herein for any pain or suffering resulting from her injury, if any."

The instruction requested was not given. However, there was nothing in the instruction given to indicate that the plaintiff was in any way entitled to damages for the pain that she had suffered.

There is but one proposition argued in the defendant's brief. That proposition is, that the plaintiff was erroneously permitted to recover damages for the pain she had suffered. The defendant says:

"Plaintiff is not entitled to recover compensation for pain or for inconvenience, nor is she entitled to recover damages for pain and mental anguish."

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It may be conceded that the defendant here states a correct principle of law. The compensation provided for by the statute is for loss of wages on account of incapacity for work, caused by accident. A hand, an arm, a leg, or any other part of the body may be injured, and the pain caused by any movement of the injured part may be so severe as to compel the injured person to cease to make any physical exertion whatever. Pain alone may render a person unable to work, or partially unable to work. If pain brought about by an injury causes inability to labor, that pain is within the provisions of the workmen's compensation act, just the same as though some part of the body had been otherwise impaired to such an extent as to render the person unable to perform labor. Compensation for loss of wages, or for loss of ability to earn wages, although that loss may be caused by pain, is not the same as damages for the pain. The former comes within the workmen's compensation act; the latter does not.

There was no error in admitting evidence concerning pain, and there was no reversible error in refusing to give the instruction requested by the defendant.

The judgment is affirmed.

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No. 21,594.

THE STATE OF KANSAS, *Appellee and Appellant*, v. JOHN COLETTI and LORENZO PERELLO, *Appellants and Appellees*.

No. 21,595.

THE STATE OF KANSAS, *Appellee and Appellant*, v. NICK BONKA and LORENZO PERELLO, *Appellants and Appellees*.

No. 21,596.

THE STATE OF KANSAS, *Appellee*, v. NICK BONKA and LORENZO PERELLO, *Appellants*.

SYLLABUS BY THE COURT.

1. CONSTITUTIONAL LAW—*Amendment of Statute by Implication*. The provisions of section 16 of article 2 of the state constitution that "no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed" has no room for application

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to an amendment by implication. (*Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781.)

2. **APPEAL BONDS—Misdemeanor Cases—Not Bail Bonds.** Chapter 188, Laws of 1915 (Gen. Stat. 1915, §§ 8201-8204), providing for appeals from convictions in misdemeanors, and which requires the defendant to give a bond conditioned upon the payment of the fine and costs, and also a bond conditioned that he will not violate the law under which the conviction was obtained, is not obnoxious to section 9 of the bill of rights, which provides that "excessive bail shall not be required."
3. **APPEALS—Power of Legislature to Impose Terms.** It is within the power of the legislature to impose additional requirements upon the exercise of the right to appeal to the supreme court from a criminal conviction, notwithstanding the provisions of section 8197 of the General Statutes of 1915, which gives such an appeal "as a matter of right."
4. **SAME—Appeal Bonds for Protection of State.** The provisions of section 8206 of the General Statutes of 1915 (Crim. Code, § 287), that the bond to stay the judgment of conviction shall be approved by the trial court or the judge thereof, or the supreme court or any justice thereof, is for the protection of the state alone, and not for the benefit of the defendant or his surety, and may be waived by the state; and the failure to have the bond approved cannot be taken advantage of by the principal, or the surety in an action to recover on a bond.

Appeals from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed February 9, 1918. Affirmed.

*Edward E. Sapp*, of Galena, and *A. L. Majors*, of Columbus, for the appellants.

*S. M. Brewster*, attorney-general, *Don H. Elleman*, county attorney, and *F. W. Boss*, of Columbus, for the appellee.

The opinion of the court was delivered by

PORTER, J.: These actions were brought for the collection of the amount claimed to be due the state on bonds given in appeals to the supreme court from convictions under the prohibitory law. The district court rendered judgment against the appellants.

The bonds were given under section 1 of chapter 188 of the Laws of 1915 (Gen. Stat. 1915, § 8201), which provides that any person convicted of a misdemeanor may appeal to the supreme court by complying with the laws then in force and giving (1) a bond in double the fine and costs, conditioned upon the

payment thereof within thirty days after the affirmance of the judgment by the supreme court, or the final disposition of the case in any other way, and (2) a bond in an amount to be fixed by the trial judge, conditioned that pending the appeal the defendant will not violate the law under which the conviction was obtained.

1. In two of the cases it is contended that the provisions of the statute are in conflict with section 16 of article 2 of the constitution of the state, which provides, among other things, that—

“No law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, the section or sections so amended shall be repealed.”

It is a sufficient answer to say that the provision of the constitution referred to has no possible application to an amendment by implication, and there is no claim that the statute amends the prior statutes in any other way than by implication. (*Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *The State, ex rel., v. Cross*, 38 Kan. 696, 17 Pac. 190, and cases cited in the opinion; 36 Cyc. 1062, 1063, and cases cited.)

2. In the same two cases it is also urged that the statute is in conflict with section 9 of the bill of rights, which provides that “excessive bail shall not be required.” There is no question of excessive bail involved in the giving of the bonds upon which the actions were brought.

3. There is a contention that the statute is in direct conflict with section 8197 of the General Statutes of 1915, which gives to the defendant in a criminal action an appeal to the supreme court from any judgment against him “as a matter of right,” but if there be any conflict between that statute and chapter 188 of the Laws of 1915, the later enactment must prevail; it would simply be a question of conflict between two statutes. There is, however, no conflict. By the later enactment the legislature recognized that the defendant in such cases has an appeal “as a matter of right,” but saw fit to impose as an additional requirement the giving of the bonds to secure the payment of the fines and to prevent further violations of the law while the appeal was pending. Besides, there is no constitutional provision which would prevent the legislature from depriving the defendant in a misdemeanor case of all right

to an appeal to the supreme court. This court has no appellate jurisdiction except that given it by the legislature. Section 3 of article 3 of the constitution first defines the original jurisdiction of the supreme court and then gives to the court "such appellate jurisdiction as may be provided by law."

4. In the remaining case (No. 21,595), but one contention is made, which is that the bond sued upon is invalid because it was not approved by the trial court or judge thereof, or by the supreme court, or some justice thereof, in compliance with the provisions of section 8206 of the General Statutes of 1915. The appellants rely upon the case of *Morrow v. The State*, 5 Kan. 563, in which a recognizance was held void because it was taken before the clerk, acknowledged before him, and approved by him, the clerk having no authority in the premises. The decision was placed squarely upon the proposition that the law requires a recognizance to be taken by order of the court, and where the instrument shows upon its face that it was not so taken, it is void. The distinction between a recognizance and an appeal bond is stated quite fully in 3 Corpus Juris, pages 1104, 1105, and in Bouvier's Law Dictionary, title "Bail." A recognizance is an obligation of record, which must be taken by the court and, when entered, becomes in the nature of a conditional judgment against the recognizer. An appeal bond is a voluntary obligation entered into by the principal and his sureties. The purpose of the appeal bonds given in the present case was to secure the state against loss if it should be determined there was no merit in the appeal, or in the event the appeal should not be prosecuted with effect. A general purpose of the requirement of appeal bonds, also, is to discourage vexatious and frivolous appeals.

The appellants are not in a position to take advantage of the failure of the state to have the bonds formally approved. If the principal in the bonds desired to insist upon their approval, he might have refused to accept his liberty and remained in the custody of the sheriff until the bonds were approved. The provision was not made for the benefit either of the principal or the surety, but solely to protect the interests of the state and prevent the acceptance of worthless bonds. Since it was for the state's benefit alone, it was a provision that might be waived by the state. The bonds, without

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being approved, served the purpose for which they were given, so far as the appellants are concerned, quite as fully as though formally approved. The principal was allowed his liberty, and, having secured all the benefits of the bonds, he, and his surety as well, are estopped from claiming that the bonds were not sufficient.

It follows that the judgments are affirmed.

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No. 21,058.

GILBERT AVERY and C. G. KEESLING, Partners as the GRAY COUNTY LAND COMPANY, *Appellants*, v. GEORGE HOWELL and FLOYD RHINEHART, Partners, etc., *Appellees*.

SYLLABUS BY THE COURT.

1. AGENT'S COMMISSION—*Exchange of Property—Evidence—Findings*. There was evidence sufficient to compel the submission of the defense to the jury, and to sustain the verdict and judgment for the defendants.
2. SAME. There was evidence which tended to support each of the findings of fact made by the jury.
3. SAME—*Action for Commission—Shifting Ground of Defense*. Before this action was commenced, the defendants gave a certain reason for refusing to perform a contract for the exchange of property. In their answer they pleaded that reason with others. There was evidence which tended to prove the truth of the reason first given. That evidence was sufficient to support the verdict and judgment for the defendants.
4. SAME—*Competent Evidence Withdrawn*. A judgment will not be reversed on account of the withdrawal of competent evidence, where it does not appear that the complaining party was injured by that withdrawal.
5. SAME—*Competent Evidence—Insolvency*. Evidence of judgments for the recovery of money is admissible where the insolvency of a judgment debtor is one of the issues presented.
6. TRIAL—*Impeachment of Witness*. Where a witness has been called by all the parties to the action, cross-examination which tends to impeach the witness is within the sound judicial discretion of the trial court.
7. TRIAL—*Requested Instructions—Refusal Not Error*. There is no substantial merit in the complaint concerning the refusal of the court to give requested instructions, nor in the complaint concerning the instructions given.

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Appeal from Gray district court; LITTLETON M. DAY, judge. Opinion filed March 9, 1918. Affirmed.

*H. O. Trinkle*, of Garden City, and *Charles A. Baker*, of Chicago, Ill., for the appellants.

*J. M. Kirkpatrick*, of Dodge City, and *J. W. Davis*, of Greensburg, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiffs seek to recover a commission from the defendants for effecting an exchange of property. Judgment was rendered in favor of the defendants, and the plaintiffs appeal. This is the third appeal in this action. (*Avery v. Howell*, 91 Kan. 297, 137 Pac. 785; *Avery v. Howell*, 96 Kan. 657, 153 Pac. 532.)

A brief statement of the facts is contained in *Avery v. Howell*, 96 Kan. 657, 153 Pac. 532. The judgment of the trial court was there reversed for the reason that there was evidence to show that fraud had been practiced on the defendants, and for the further reason that the trial court ignored the issue made by the pleadings as to the purchaser being ready, able, and willing to exchange properties on the agreed terms. On the trial from which the present appeal is taken, the jury answered special questions of fact as follows:

"1. Did Avery & Keesling make any statements which they knew to be false to Howell & Rhinehart, concerning the incumbrance of Hanna's property or the ownership thereof? Ans. Yes.

"2. If you answer the above question one in the affirmative, then state what statement they knowingly and falsely made? Ans. That Hanna was the owner of *all* (underlined in the original) of the stock of goods and other properties described in the contract.

"3. Was not the only reason assigned by Howell & Rhinehart for their refusal to complete the deal, at the time of their refusal to complete the same, that Hanna was unable to comply with the written contract? Ans. Yes.

"4. If you answer the above question in the negative then state what other reason Howell & Rhinehart did assign? No answer.

"5. Could Hanna, if given a reasonable time, have raised sufficient funds to have passed the title subject to no more than \$6,500.00? Ans. No.

"6. Did Avery & Keesling fail to disclose to Howell & Rhinehart any knowledge they had as to Hanna's financial condition, before the contract was signed? Ans. Yes.

"7. If you answer the above question 6 in the affirmative, then state what knowledge they had that they failed to disclose? Ans. Failed to

disclose Hanna's indebtedness to be more than \$6,500.00 before the contract was signed.

"8. Did Hanna, to the knowledge of plaintiffs, make any statement which he knew to be false and they knew to be false concerning the incumbrance on his property of the ownership thereof? Ans. Yes.

"9. If you answer the above question 8 in the affirmative, then state what statements which he knew to be false and they knew to be false he so made to their knowledge? Ans. That the incumbrance on the property was not more than \$6,500.00.

"10. Is it not a fact that after defendants had refused to perform their contract with Hanna and before this suit was brought they secured a release of their obligations to Hanna under the said contract in consideration of the sum of \$150.00 which they paid to Hanna's attorneys for him? Ans. Yes.

"11. Did Hanna, when he executed the contract, know that the Rock Island Implement Co. had recorded the contract which they had with him? Ans. No evidence to show that he did know."

1. The plaintiffs argue that there was no merit in the defense; that the court should have sustained the plaintiffs' demurrer to the defendants' evidence; and that after the evidence had been submitted to the jury, the court should never have allowed the verdict to stand. This argument is directly opposed to the decision rendered by this court in *Avery v. Howell*, 96 Kan. 657, 153 Pac. 532. It may be that the evidence on the last trial was not the same as on the trial from which the last preceding appeal was taken, but it is probably safe to assume that the evidence was substantially the same. Based on that assumption, the question now presented has been decided. Be that as it may, there was evidence on the last trial sufficient to compel the court to submit the defense to the jury.

2. The plaintiffs urge that the findings of the jury, except findings numbered 3, 10, and 11, were not sustained by any evidence whatever. The voluminous abstract and the transcript of the evidence have been carefully read, and this court is unable to agree with the plaintiffs in this matter. There was evidence which tended to support each of the findings made by the jury. That evidence cannot be here recited without making this opinion exceedingly long.

3. The court instructed the jury—

"That where a party gives a reason for his conduct and decision touching anything involved in controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another different consideration."



The plaintiffs claim that before the present action was commenced, the defendants gave as their reason for refusing to pay the commission that Hanna was unable to perform his part of the contract. The plaintiffs further claim that the defendants were permitted to change their grounds, or reasons, for not performing the contract. To support their contention, the plaintiffs rely on the answer made by the jury to the third special question. The answer to the plaintiffs' argument is that, even if the defendants did introduce evidence to establish grounds other than those first given by them for refusing to perform the contract, there was evidence to show the truth of the ground which the plaintiffs say was first given by the defendants. The latter evidence was sufficient to support the verdict and judgment so far as this matter is concerned.

4. Soon after the defendants refused to preform the contract signed by them, H. D. Hanna commenced an action in the district court of Finney county to enforce specific performance of that contract. That action was afterward dismissed by Hanna on the payment of \$150 to him by the defendants. The plaintiffs introduced in evidence a certified copy of the record in that action. That record was afterward withdrawn from the consideration of the jury. Complaint is made of the order withdrawing that record. Wherein this harmed the plaintiffs does not appear. The tenth question answered by the jury finds that such a settlement was made, and there was evidence to support that finding. Withdrawing the record of the action from the consideration of the jury did not prejudice the plaintiffs, even if that record was competent evidence.

5. Another matter of which complaint is made, is that the court erred in admitting in evidence judgments that were rendered against H. D. Hanna after the contract between him and the defendants had been signed. The answer to this complaint is that one of the defenses pleaded was that Hanna was insolvent and unable to carry out and perform his contract. Evidence of the judgments was admissible on the question of Hanna's solvency.

6. H. D. Hanna was called as a witness by the plaintiffs and also by the defendants. He was first called by the plain-

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tiffs, afterward by the defendants, and then recalled by the plaintiffs. When Hanna was recalled by the plaintiffs, the defendants were permitted to ask questions impeaching his credibility as a witness. The plaintiffs contend that this was error. The rule is that a party cannot ordinarily impeach his own witness. (*Johnson v. Leggett*, 28 Kan. 590; *The State v. Sorter*, 52 Kan. 531, 34 Pac. 1036; *The State v. Keefe*, 54 Kan. 197, 38 Pac. 302.) But, whether a party may impeach his own witness is largely within the sound judicial discretion of the trial court. (*St. L. & S. F. Rly. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.) Even if the defendants were erroneously permitted to cross-examine Hanna concerning matters that affected his credibility as a witness, it does not appear that the cross-examination did, in any way, prejudicially affect any substantial right of the plaintiffs. This court is precluded by section 581 of the code of civil procedure from reversing the judgment, because it appears on the whole record that substantial justice has been done.

7. Complaint is made of the refusal of the court to give an instruction requested by the plaintiff, and complaint is also made of an instruction given by the court. These instructions have been examined. The complaints are without substantial merit.

The judgment is affirmed.

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No. 21,079.

CATHERINE MULCAHY, *Appellee*, v. THE CITY OF MOLINE,  
*Appellant*.

OPINION ON REHEARING.

SYLLABUS BY THE COURT.

TERM OF COURT—*Adjournment by Sheriff*. Where a court record shows that an adjournment of court *sine die* was announced by the sheriff and recorded by the clerk, there is a presumption that the announcement was made pursuant to an order of the court, and the personal presence of the judge in the court room was not required to give such order validity.

Appeal from Elk district court; ALLISON T. AYRES, judge. Opinion on rehearing filed March 9, 1918. Reversed. (For original opinion of affirmance see 101 Kan. 532.)

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Mulcahy v. City of Moline.

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*W. A. Elston*, city attorney, and *Chester Stevens*, of Independence, for the appellant.

*W. P. Hackney*, *L. D. Moore*, *A. M. Jackson*, *A. L. Noble*, all of Winfield, and *Ed. J. Fleming*, of Arkansas City, for the appellee.

The opinion of the court was delivered by

DAYSON, J.: This is a rehearing. The case was fully stated in our first opinion (*Mulcahy v. City of Moline*, 101 Kan. 532). It was there held that, in the absence of a positive showing that the May term of the district court had adjourned prior to the time the motion to set aside the order of dismissal and to grant time to file an amended petition was allowed, a presumption that court had not adjourned would be indulged, and that the defendant city should answer, but that in such answer it might plead the facts touching the adjournment.

The city now asks leave to supply the following record:

"ADJOURNMENT OF MAY, 1916, TERM.

In the district court of Elk county, Kansas.

County of Elk, state of Kansas, ss.

Now on this 2nd day of September, A. D. 1916, all cases of the May, 1916, term of this court having been called to the judicial notice of Honorable A. T. Ayres, judge of this court:

Court was adjourned by J. K. Munsinger, sheriff, sine-die.

J. K. Munsinger, sheriff, and W. B. Russell, clerk, being present.

W. B. RUSSELL, Clerk."

Appellee contends that this adjournment is void, for the reason that the sheriff had no power to adjourn court, as his authority to do so is limited to that conferred by the statute:

"If the judge of a court fail to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn the court from day to day, until the judge attend or a judge *pro tem.* be selected; but if the judge be not present in his court, nor a judge *pro tem.* be selected, within two days after the first day of the term, then the court shall stand adjourned for the term. The sheriff shall exercise the powers and duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law." (Gen. Stat. 1915, § 7676.)

It is clear that the adjournment recorded was not made under any of the circumstances covered by the statute just quoted, and that the sheriff was not undertaking to act under

any authority supposed to be thereby conferred on him. It is the view of this court, that the words "court was adjourned by J. K. Munsinger, sheriff, *sine die*," were meant to express the idea, not that the sheriff assumed to decide that the court should be adjourned and to make an order accordingly, but that he announced an adjournment presumably directed by the proper authority—that he promulgated the order at the direction of the judge. It is common for a judge to say to a bailiff, "Adjourn court until [for instance] tomorrow morning," and the record in such case might show that the direction was obeyed. Colloquially the bailiff is spoken of in such a case as adjourning the court, but all understand that what is really done is that the court, acting through the judge, decides and orders, and therefore makes, the adjournment, and the bailiff merely gives publicity to the fiat. The recital of the record above quoted, that the sheriff and clerk were present, may imply that the judge was not in the court room when the proclamation was made, but it does not necessarily indicate that he had not been in the court room when the direction was given, and it does not even suggest that he was not then in the court house—much less that he was absent from the county. It is not essential that the judge shall be present in person in the court room when an order is made. This court makes many orders outside of the court room, which are communicated to the clerk by telephone and by him entered upon the record. In a recent murder case the greater part of the trial was had outside of the court room. (*The State v. Sweet*, 101 Kan. 746, 168 Pac. 1112.) The recital of the record, that all the cases of the term had been called to the judicial notice of the judge, seems substantially equivalent to a statement that the business of the term was ended—the record of a finding to that effect, which is to be attributed to the judge rather than to an executive or ministerial officer. This court interprets the entry as meaning that the judge properly ordered the adjournment, and the sheriff announced it—an interpretation which finds added support in the fact that the record has been permitted to remain unchanged. If it related to the unauthorized act of the sheriff, the presumption would seem to be that it would have been expunged. The court sees no conflict between this decision and that

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rendered in *In re Terrill, Petitioner*, 52 Kan. 29, 34 Pac. 457. What was decided there was that the clerk cannot (without statutory authority) adjourn the court. When the order there involved was attempted to be made, the judge seems not to have arrived in the county; there was nothing in the record to suggest that the clerk acted otherwise than upon his own motion, and no suggestion to that effect appears to have been made.

It follows that our former judgment of affirmance should be set aside, and the judgment of the district court will now be reversed with instructions to set aside its order reinstating the cause, and with further instructions that the cause be dismissed.

DAWSON, J. (dissenting): In the case of *In re Terrill*, supra, it was said:

"The opening, holding and adjournment of court are the exercise of judicial power, to be performed by the court. To perform the functions of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law." (p. 31.)

(See, also, *The State, ex rel. Barber, v. McBain*, 102 Wis. 431.)

It was conceded in the oral argument that the judge was not in the court room at the time court was adjourned, and some doubt was expressed as to whether he was even in the county.

I think we should adhere to the old rule that the personal presence of the judge is requisite to a valid adjournment of court, except under the circumstances expressly covered by the statute.

JOHNSTON, C. J., and MARSHALL, J., join in the dissent.

No. 21,096.

THE MAPLE GROVE DRAINAGE DISTRICT, *Appellant*, v. A. A. HICKS et al., as the Board of Highway Commissioners of Grant Township in Douglas County, *Appellees*.

## SYLLABUS BY THE COURT.

**DRAINAGE DISTRICT—No Power to Regulate Construction of Highways or Highway Culverts.** The statute defining the powers and duties of a drainage district does not vest it with power to regulate the construction of highways or of culverts forming parts of highways within the district, but such power over township highways is vested in township officers; and, therefore, the drainage district may not maintain mandamus to compel township officers to construct highway culverts in the district so that they will operate as dams and sluiceways.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed March 9, 1918. Affirmed.

J. B. Wilson, and B. V. Pardee, both of Lawrence, for the appellant.

John Q. A. Norton, and Walter G. Thiele, both of Lawrence, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: This proceeding in mandamus was brought by a drainage district to compel township officers, acting as a board of highway commissioners, to construct culverts of certain dimensions and form at three points on highways within the drainage district. The questions involved in this appeal arise upon the ruling of the trial court in sustaining a demurrer to plaintiff's petition. It was alleged that in the drainage district are three bayous or sections of lowland separated by higher ground; that at times of excessive rains large quantities of water collect in these low places; that the natural drainage in the district is in a southerly direction, toward the Kansas river; and that plaintiff had caused surveys to be made and was proceeding to establish and complete a system of drainage under which the water would pass into the Kansas river through a tile thirty inches in diameter which was then in course of construction. The plans made contemplated that the

water should pass from one bayou or low place to another through pipes or openings not larger than thirty inches, and from the lower bayou through the thirty-inch tile leading to the river. On the higher ground separating the bayous, township highways have been established and culverts are about to be built by the township officers with rectangular openings four feet by six feet in size. It is alleged that these openings would allow the water to pass from one bayou to another in greater volume than could be carried by the tile or single outlet leading to the river. The district served notice of its purposes and plans upon the township officers, with a demand that they build culverts at certain designated places, not to exceed thirty inches in diameter, of substantial material and good construction; but, notwithstanding the notice and demand, the defendants are proceeding to build the culverts in dimensions of four by six feet.

It is insisted that to allow the defendants to build the culverts as they were proceeding to do would result in allowing the water to flow through the ditches much faster than it could be carried off through the thirty-inch tile leading to the river and would defeat the plaintiff's right, as given it by statute, to control the construction and maintenance of its drainage system. Plaintiff is not proposing to build culverts, nor is it claiming that it has authority over the construction and maintenance of the township highways of which the culverts form a part. These powers have been expressly conferred on the township officers. (Gen. Stat. 1915, § 8765.) The powers of the drainage district have been specified by the legislature, but nothing in the act authorizes it to regulate the construction of highways, or to deprive township officers of the powers conferred upon them respecting highways. (Gen. Stat. 1915, § 3896.) Culverts constitute a part of the highway and are necessary to its construction, and the township officers are not only given control of the construction, but the township itself is made liable for injuries which result from defective construction. (Gen. Stat. 1915, § 722.) It may be that culverts or openings of the sizes demanded by the drainage district will not be sufficient to properly drain the water from the highways and, at any rate, the determination of that question is vested in the township officers.

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The district is not complaining that the culverts will not allow the water to flow freely across the highways, but that they will not retard the flow of drainage so as to accommodate a small pipe at the lower end of the district. There might be cause for complaint if the officers had constructed the highways so that they would have prevented the free flow of water, but it appears that the proposed construction facilitates the flow, and presumably it is one which contributes to the efficiency and durability of the highways. The plaintiff is asking, in effect, that the township officers be compelled to construct the highways so that they will operate as dams and sluiceways, holding back the water during periods of excessive rains and only allowing the passage of so much as will flow through a pipe thirty inches in diameter. If dams, levees, floodgates, and sluiceways are essential to efficient drainage of the district, the plaintiff has the power to construct them (Gen. Stat. 1915, § 3896), but the legislature has not authorized it to control the construction and maintenance of highways.

The law of course proceeds on the theory that officers in the performance of their several duties in the district will co-operate so far as practicable, so that the exercise of the powers devolved upon one will not obstruct or defeat those conferred on the other, and that all will work together for the general welfare. It must be assumed that the township officers were acting in good faith, and until the legislature gives the drainage district the control of highways in the district, such control must be exercised by the officers upon whom it has been laid.

The judgment of the district court is affirmed.



No. 21,102.

W. LISTEN DECKER, *Appellee*, v. J. H. BAILEY and KATE BAILEY, *Appellants*.

## SYLLABUS BY THE COURT.

NEW TRIAL—*Properly Granted*. The proceedings considered, and *held*, the court did not abuse its discretion in granting a new trial.

Appeal from Gove district court; JACOB C. RUPPENTHAL, judge. Opinion filed March 9, 1918. Affirmed.

*John B. Ennis*, of Oakley, *Lee Monroe*, *James A. McClure*, and *C. M. Monroe*, all of Topeka, for the appellants.

*Arch L. Taylor*, of Russell, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The defendants appeal from an order sustaining generally a motion for a new trial, based on all the statutory grounds.

A statement of the proceedings is not necessary. The district court might have been satisfied the plaintiff was not afforded a reasonable opportunity to present his case, because, after taking leave to amend his answer, the defendants did not do so, and the plaintiff did not know the answer would not be amended in time to prepare for trial on the pleadings as they stood at the term at which the cause was heard. Some improper evidence was admitted. Essential features of the defendants' case depended on oral testimony, which the court might have believed the jury should not have credited.

The judgment of the district court is affirmed.

No. 21,105.

NINA W. JONES, *Appellee*, v. R. S. HARPER, IDA M. HARPER,  
and JOE R. SMITH, *Appellants*.

## SYLLABUS BY THE COURT.

**TAXATION—Defective Notice of Redemption—Voidable Tax Deed.** In the statutory notice that tax deeds will be issued on a date named, upon sales of three years before, unless the land is sooner redeemed, the statement of the amount of "taxes, charges and interest calculated to the last day of redemption" should not include the delinquent tax of the year preceding such notice, where the land was bid in for the county, and the certificate has not been assigned. A tax deed based upon a notice in which such charge is included is properly set aside on that ground when attacked within five years.

Appeal from Gray district court; LITTLETON M. DAY, judge.  
Opinion filed March 9, 1918. Affirmed.

*John Harper*, of Cimarron, *Albert Watkins*, and *Arthur C. Scates*, both of Dodge City, for the appellants.

*Harry Brice*, and *J. E. Mulligan*, both of Cimarron, for the appellee.

The opinion of the court was delivered by

MASON, J.: The plaintiff in ejectment recovered a judgment, and the defendant appeals. The defendant claims under a tax deed less than five years old. The trial court held that it was voidable, because the amount required to redeem was overstated in the notice of the conveyance of unredeemed lands. The case turns upon the correctness of this ruling.

The land was offered for sale for the delinquent tax of 1910, on September 5, 1911, and bid off for the county. The certificate was not assigned until September 7, 1914. On April 2, 1914, the statutory notice was published, stating that unless the land was redeemed on or before September 7, 1914, a tax deed would be issued. (It would seem that the date named should have been September 5, but this does not affect the determination of the case in any way.) The statute required the notice to show "the amount of taxes, charges and interest calculated to the last day of redemption." (Gen. Stat. 1915, § 11446.) In arriving at this amount the treasurer included

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the tax of 1913, which had not been paid, together with the penalty which had accrued in December, and one which was to accrue in June, and the costs of advertising a sale in September, 1914. In support of the correctness of this practice it is argued that the purpose of the notice is to advise the owner of the precise sum he would be required to pay in order to redeem upon the last available day—September 7, 1914. It is true that, as it turned out, if the owner had attempted to redeem at that time he would have been required to pay the tax of 1913 (together with the June penalty, and the costs of advertising the land for sale in September, 1914), because on that day, not having been paid, it was properly added to the lien evidenced by the certificate. (Gen. Stat. 1915, § 11426.) It is also true that on the date of the first publication of the redemption notice (April 2, 1914) the tax of 1913 was in a sense due and was a lien on the land, because under the statute that condition arose on November 1. (Gen. Stat. 1915, § 11348.) Moreover, the failure to pay half of the 1913 tax on December 20 rendered the whole of it subject to be "collected as provided by law." (Gen. Stat. 1915, § 11396.) But it could not have been known on April 2 that an additional penalty was to accrue in June, for the owner might have chosen to escape it by paying the tax; and it could not have been known that the payment of the 1913 tax would be necessary to a redemption made on September 7. Apart from the possibility of the tax being paid, an assignment of the certificate might have been made to an individual between April 2 and September 7; in that case the payment of the 1913 tax would not have been required of the assignee (*Gibson v. Trisler*, 73 Kan. 397, 85 Pac. 413), nor of any one who redeemed after such assignment, unless in the meantime the holder of the certificate had paid it and caused it to be indorsed thereon. (Gen. Stat. 1915, § 11437.) Inasmuch as the tax-sale certificate was still owned by the county, the statute required four weeks' notice to be given that on the first Tuesday of September, 1914 (September 1), the land would be sold for the tax of 1913; but when that time arrived, the certificate not having been assigned, instead of a new sale being made, the amount of the 1913 tax was added to the amount of the lien represented by the certificate of the first sale. (Gen. Stat. 1915, § 11426.) By the express terms of

the statute the land was subject to sale for the tax of 1913 only in case it was not paid by June 20, 1914. (Gen. Stat. 1915, § 11408.) While the tax of 1913 was in a sense delinquent when the redemption notice was made out, in April, 1914, it had not become a charge in connection with the sale made in 1911—it had not been added to the amount required to redeem from that sale, nor could it then have been known that it ever would become a part of that amount. The machinery had not yet been set in motion for the enforcement of the tax of 1913—for the sale of the land for its payment, or for adding its amount to the sum for which the first sale was made. In 1914, the first Tuesday of September (the day of the tax sale) happened to come on the first day of the month, so that in this instance the time for the charging of the tax of 1913 to the sale of 1911 arrived before the period allowed for redemption had expired. But a tax sale made on the first Tuesday of September in 1912 (September 3) would have been ripe for a deed on September 4, 1915, and the 1914 tax could not have been added to the amount due under the sale until September 7. It is therefore clear that the notice published in April, 1915, could not include the tax of 1914 as a part of the amount required to redeem from the sale of 1912. An interpretation that would result in the delinquent tax of the prior year being sometimes included and sometimes excluded, according to the day of the month on which the tax sale happens to fall, is not one to be favored. We conclude that the tax of 1913 should not have been included in the amount stated in the redemption notice.

The overstatement of the amount required by the statute is a ground for setting aside the deed. (*Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837.) In *Watkins v. Inge*, 24 Kan. 612, a tax deed was upheld in which the unpaid tax of the preceding year was not included in the amount named in the redemption notice. In behalf of the appellant it is suggested that the opinion contains an intimation that the notice was defective in this regard, but that the defect was not sufficient to avoid the deed. There the court merely passed on what was before it, but determined that the deed was valid, even assuming that the tax of the preceding year should have been shown.

The judgment is affirmed.

No. 21,118.

E. SHORE and KITTIE SHORE, *Appellants*, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

**SHIPPER OF STOCK—*Dangerous Position Voluntarily Taken—Injuries—Railway Company Not Liable.*** One who was traveling on a shipper's pass, accompanying stock being transported to market, got off the caboose at a station where the train was stopping to unload other stock, and while waiting at the station was ordered or directed by the station agent and a brakeman to take a key and deliver it to the train crew at the cattle pens and to ride back on that part of the train. He voluntarily obeyed the order or direction, and while getting upon the side of a car to ride back, was caught between the side of the car and the cattle chute and received injuries from which he died. *Held*, that as he voluntarily placed himself in a position of obvious danger and was not engaged in looking after or caring for the stock in his charge, the railroad company is not liable in an action to recover for his death. (*A. T. & S. F. Rld. Co., v. Lindley*, 42 Kan. 714, 22 Pac. 703.)

Appeal from Sedgwick district court, division No. 1; THOMAS C. WILSON, judge. Opinion filed March 9, 1918. Affirmed.

*John W. Adams*, and *George W. Adams*, both of Wichita, for the appellants.

*William R. Smith*, *Owen J. Wood*, and *Alfred A. Scott*, all of Topeka, for the appellee.

The opinion of the court was delivered by

PORTER, J.: Alleging that the death of their son, John Shore, was caused by the defendant's negligence, plaintiffs sued to recover damages. The court sustained a demurrer to the evidence, and they appeal.

John Shore was in charge of a carload of cattle being shipped from Wichita. At the station of Norwich it was necessary for the defendant to unload two head of stock at the local cattle pens, which were about 1,100 feet from the railway station. Young Shore, who was 21 years of age, alighted from the caboose and stood at the station platform waiting for the train to resume its journey. When the train crew in charge of the

car to be unloaded arrived at the cattle pens the cattle chute was found to be locked, and it became necessary to obtain a key before the car could be unloaded. They signaled the station agent for the key, and the brakeman and the station agent requested plaintiffs' son to take the key down to the cattle chute and ride back to the station on that part of the train. He took the key and delivered it to the train crew. Shortly afterwards he was found lying by the track near the cattle chute, and died almost immediately from his injuries. There was no eyewitness to the accident, but the circumstances indicated that he climbed on the side of one of the cars to ride back to the station, and was caught between the side of the car and the end of the cattle chute and received the injuries which resulted in his death. It was contended that because he was acting under the orders of the station agent and brakeman, performing a service solely for the defendant's benefit, the defendant is liable; that it was negligent in maintaining its cattle chute so close to the tracks that a person attempting to climb upon the train or ride upon the side of the car would be knocked down and injured.

The defendant admits that the fair inferences to be drawn from the circumstances in evidence are that the deceased was caught and crushed between the cattle chute and the side of one of the cars, but insists there was no evidence tending to show any negligence on the part of the defendant. It is urged that the act of the station agent and brakeman in sending him down to the chute with the key and telling him to ride back on the train could not have been the cause of his death; that if he was on the side ladder of the car, he must have climbed on near the cattle chute, and, by the use of his ordinary faculties of observation, he could have perceived the danger of being injured. An authority relied upon by the defendant is *A. T. & S. F. Rld. Co., v. Lindley*, 42 Kan. 714, 22 Pac. 703, where a shipper of stock, at the request of the conductor, got on top of the train to help signal and was thrown off by a sudden movement of the train and injured. There, as in the present case, the train was in charge of the conductor, but it was said in the opinion that the order or direction of the conductor to go on top of the cars and help signal "was entirely without the routine of the conductor's duties;

and as it was voluntarily obeyed by Lindley, it could not fasten any liability on the railroad company." (p. 723.) If he acted as an employee or brakeman it was of his own volition. The defendant also relies upon the terms of the shipping contract pleaded in the answer, by which the deceased received free transportation with the stock and by which he agreed to remain in a safe place in the caboose while the train was in motion, and that he would not get upon any freight car while switching was being done or about to be done at stations or at any other time or place.

In our opinion the act of the station agent and brakeman in requesting the deceased to take the key down to the cattle chute and directing him to ride back on the train was not the cause of his death. He was under no obligation to obey the order or direction of these employees, neither of whom had any charge of the train. Even if the conductor, in whose sole charge the train was, had given him the order, it would have been optional with him whether or not he obeyed the request. From his age and intelligence, as shown by the evidence, it is apparent that he must have known the danger of attempting to get on the side of a car passing the cattle chute, and there is nothing in the evidence to indicate that any of the employees of the defendant saw or knew that he was in a position of danger. It is not even claimed that the station agent or brakeman told him what position to take on the train or how to get on it, although it would not seem that if this had been done it would have added anything to the plaintiffs' cause of action.

He voluntarily placed himself in a position of obvious danger at a time when he was not engaged in the performance of any duties connected with the care of the stock in his charge, and, following the rule declared in the Lindley case, *supra*, the demurrer to the evidence was rightly sustained.

The judgment is affirmed.

No. 21,120.

CHARLES H. PRATHER et al., *Appellees*, v. JOHN EDEN, *Appellee*, and JOHN A. WYER, *Appellant*.

## SYLLABUS BY THE COURT.

1. AGENCY—*Commissions—Fraud—Separate Trials*. The court properly exercised its discretion in refusing separate trials of the issues.
2. SAME—*Fraud—Burden of Proof*. The burden of proving fraud was properly placed on the party alleging it.
3. SAME—*Instructions—New Trial*. There was no error respecting instructions or in refusing a new trial.

Appeal from Kingman district court; GEORGE L. HAY, judge. Opinion filed March 9, 1918. Affirmed.

*John H. Connaughton*, and *H. E. Walter*, both of Kingman, for the appellant.

*S. S. Alexander*, of Kingman, for the appellee, John Eden.

The opinion of the court was delivered by

WEST, J.: The plaintiffs sued the defendants to recover a real-estate commission of \$500 for finding a purchaser for the defendant Eden, of a farm at \$9,000, such purchaser being the defendant Wyer. It was alleged that as a result of the plaintiffs' efforts Eden contracted with Wyer for the purchase of the land at \$9,000; that afterwards, Wyer, learning that the plaintiffs were to receive \$500 commission, for the purpose of cheating them fraudulently stated to Eden that if he would accept \$8,500, instead of \$9,000, as provided by the contract, Wyer would stand good for any loss to Eden, Wyer claiming that he had been defrauded by the plaintiffs. The plaintiffs dismissed as to Wyer. Eden answered that the \$500 would not be due until paid by Wyer, and denied any conspiracy. He also filed a cross-petition against Wyer for the \$500.

Wyer complains that the court refused a separate trial of the issues between the plaintiffs and Eden and of those between Eden and himself, that the burden of proof was placed on him, and of certain instructions given and refused, and the denial of a new trial.



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As to the matter of separate trials, the court exercised, and we cannot see that it abused, its discretion.

The question of misjoinder could, under the code, be raised only by demurrer or answer. (Civ. Code, § 95, Gen. Stat. 1915, § 6986.)

Wyer was the only party alleging fraud, and the court did not err in putting the burden on him to prove it. We have examined the instructions given and refused and find no error in respect thereto.

The evidence justified the verdict, a new trial was properly refused, and the judgment is affirmed.

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No. 21,140.

A. E. EVERITT, *Appellee*, v. WILLIAM HENRY HASKINS and MARY R. HASKINS (WILLIAM M. PECK, Garnishee), *Appellants*.

SYLLABUS BY THE COURT.

PROCEEDINGS IN AID OF EXECUTION—*Will—Spendthrift Trust*. To create a spendthrift trust a will need not expressly declare that the interest of the *cestui que trust* shall be beyond the reach of his creditors. It is sufficient if that intention can be clearly ascertained from the whole will. In the present case, it is held that the will created such a trust and that the trust property cannot be reached by creditors of the *cestui que trust*.

Appeal from Cloud district court; JOHN C. HOGIN, judge. Opinion filed March 9, 1918. Reversed.

Homer Kennett, Olin Hunter, and Tom Kennett, all of Concordia, for the appellants.

Park B. Pulsifer, and Charles L. Hunt, both of Concordia, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendants appeal from an order made in a proceeding in aid of execution.

The will of William H. Haskins was probated on February 19, 1908. It provided for the payment of the debts of the

testator, and, among others, contained the following additional provisions:

"Second. I give, devise and bequeath all of the balance of my property, both real and personal, after the payment of my debts, to my wife Lydia Haskins, if she survives me, for her use and benefit during her life, with full power to use and dispose thereof, as she may see fit, for her own comfort and pleasure, and not to account to any one for such use, nor be in any wise restricted in the use thereof, whether of income, increase or the property itself.

"Third. Any of my property that may remain after the death of both myself and my wife not expended, used or disposed of I hereby give, devise and bequeath to my three children, Emma M. Gleason, William Henry Haskins and Lida Nelson, share and share alike. Should any of my children die before either myself or wife, then such share, as he or she would have received, as herein provided, shall go to their descendants if any, and if they leave no descendants then to the surviving of my children, in equal shares. The share of my son William Henry, as provided herein, shall not be given into his control, but shall be put into the hands of my Executor, Wm. M. Peck, as Trustee for my said son. Said Trustee shall invest and manage the same, as to him seems best, and pay to my said son the sum of Three Hundred Dollars (\$300.00) per annum, in semi-annual installments of \$150 each, but such amount may be increased to whatever may be considered necessary, by the Trustee, by any change in condition of said William Henry, to an amount sufficient for his comfort. Such amount to be paid by the Executor, or Trustee, out of any money thus coming to him, whether income, increase, or the corpus of the estate so given; it being my intention that he shall have, as above provided, the said sum of Three Hundred Dollars, or more if necessary, per year, so long as there shall remain any property herein given him from which to pay it. Should there be any of the estate herein given to my son William Henry remaining at his death, it shall be paid over and conveyed by the Trustee to the heirs of said William Henry. It is my will and I hereby direct, that in no event shall any of my estate ever be given to the husbands, either present or future, of my daughters, but shall be kept free from such husbands, during the life of my said daughters, and, if any remains of their respective shares at their death, it shall go to their heirs, other than their husbands. It being my will and intention that my said daughters, after they receive their share, shall be unrestricted in the use, or disposition thereof, in any other way than, as herein provided, that it shall in no event go to their husbands.

"Fourth. It is my will, and I hereby appoint as the executor of this, my last will and testament, Wm. M. Peck, and, as trustee for the share of my son William Henry, when the same shall come to him; . . .

"Fifth. I hereby vest the legal title of and to all real estate, that I may own, in my wife, so long as she may live, and hereby give her full power to transfer, convey and dispose of the same, and execute any and all deeds of conveyance thereof, that may be necessary or convenient.

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"After the death of my wife, such power is hereby vested in my executor and trustee to sell transfer and convey any and all property, at any time in the execution of the trust herein imposed."

On September 29, 1914, the plaintiff obtained a judgment for \$1,123.61, in the district court of Cloud county, against the defendants, William Henry Haskins and Mary R. Haskins. On November 7, 1914, execution was issued on the judgment, but no property was found on which the execution could be levied. On December 24, 1914, an affidavit, under section 524 of the code of civil procedure, was filed with the probate judge of Cloud county, alleging that the plaintiff had reason to believe and did believe that Wm. M. Peck had property of William Henry Haskins and was indebted to him, which property was not exempt from being taken on execution to satisfy the judgment heretofore rendered. The defendant, Wm. M. Peck, appeared and was examined. The probate judge ordered Wm. M. Peck, as trustee, to pay \$300 per annum in semiannual payments to the clerk of the district court to be applied on the judgment, interest, and costs; and, until the judgment, interest, and costs are paid in full, to pay such additional sums to the clerk of the district court as the trustee might otherwise see fit to pay to defendant William Henry Haskins. The probate judge further orderd the trustee, until the judgment, interest, and costs are fully paid, to make no transfer or disposition, other than as above directed, of any of the property in his hands as such trustee, and to pay no money and to turn over no property to William Henry Haskins. /e

From the order of the probate judge the defendants appealed to the district court. That court sustained and confirmed the rulings and orders made by the probate judge. From the order made by the district court the defendants appealed to this court. They argue that the will created a spendthrift trust, and that the funds in the hands of the trustee cannot be reached by the creditors of William Henry Haskins.

Cases involving the law of spendthrift trust have been before this court on two occasions. The first time in *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030, and the last time in *Pond v. Harrison*, 96 Kan. 542, 152 Pac. 655. The decision in the

latter case will not assist the court in the case that is now presented, for the reason that in the Pond case the will expressly stated that the fund therein bequeathed should not be subject to the payment of the debts of the spendthrift, on execution, attachment, or otherwise. The present case must be determined according to the rules announced in *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030. In that case this court said:

"The rule adopted by the majority of the American courts is that 'it is lawful for a testator or grantor to create a trust estate for the life of the *cestui que trust*, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed by the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts.' (26 A. & E. Encycl. of L. 139.) . . . The question is a new one in this state. There is no statute or decision upon the subject, but we see no reason why the rule adopted by the majority of the courts of this country should not apply here. . . . It accords not only with the weight of authority in this country and with sound reasoning, but also with the general policy which the state has always maintained respecting the rights of creditors and debtors as shown in the liberal provisions of our exemption laws. . . . There is some conflict in the authorities as to what is essential to the creation of a spendthrift trust. It seems to be clearly established, however, that the intent need not be stated in express terms." (pp. 657, 659, 660.)

"It is not necessary that an instrument creating a spendthrift trust should contain an express declaration that the interest of the *cestui que trust* in the trust estate shall be beyond the reach of his creditors, providing such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances. The court will look to the intention disclosed by the whole instrument, rather than to the language employed in any particular clause of it." (26 A. & E. Encycl. of L., 2d ed., 141.)

(See, also, notes found in 3 A. & E. Ann. Cas. 1010; 18 Ann. Cas. 495; Ann. Cas. 1917 B, 400; 24 Am. St. Rep. 686.)

In *Leary v. Kerber*, 255 Ill. 433, a will containing provisions very closely parallel to the one now under consideration was held to create a spendthrift trust.

The will of William H. Haskins expressly provides that none of the property shall be given into the control of William Henry Haskins, but, instead thereof, that control is given to the trustee, who shall invest it and manage it as to him seems best. Any payment over \$300 per annum is within the discretion of the trustee. The wife of the testator, during her life, had absolute power of disposition over the entire estate, and after

her death that power was given to the trustee. The trustee's control, discretion, and power of disposition cannot be regulated or directed at the suit of creditors. The exercise of such authority by the courts would be in contravention of the terms of the will.

Why did the testator put these provisions in his will? The answer is that he intended that William Henry Haskins should not exercise any discretion concerning, or any control or power of disposition over, the property that was placed in the hands of the trustee.

William Henry Haskins cannot control or dispose of the semiannual payments before they have been paid to him. The will directs that the payments shall be made to him. If he can assign or transfer his right to the payments before they are made, or before they are due, he can entirely defeat the will so far as provision therein made for his benefit is concerned. If he can assign the payments and give to his assignee the right to collect them, he can assign all the payments that will ever be made to him, and he can transfer to his assignee all the benefits that are given to him under the will. That would be in contravention of the terms of the will. If Haskins cannot assign the payments, his creditors cannot, by any legal proceeding, appropriate them to the payment of the debts of Haskins. It follows that the will created a spendthrift trust to which creditors of William Henry Haskins cannot look for the payment of any debts contracted by him.

The judgment is reversed, and judgment is rendered in favor of the defendants.

No. 21,147.

CELINA LASNIER, *Appellee*, v. LAURA BERTHIAUME et al.  
(HELEN MARTIN et al., *Appellants*).

## SYLLABUS BY THE COURT.

1. **APPEAL**—*No Transcript of Evidence—Scope of Review.* Failure to provide a transcript of the evidence does not necessarily require the dismissal of an appeal; it merely excludes from the scope of the review those features of the lawsuit dependent thereon.
2. **WILLS**—*Rule against Perpetuities.* The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being, excluding from such computation of years the incipient life of infants *in ventre sa mere*.
3. **SAME.** Provisions of a will which direct that no disposition of certain property shall be made "within twenty-one years after the death of my beloved wife" are void under the rule against perpetuities.
4. **SAME**—*Offends Rule against Perpetuities—Descent of Estate.* When a future estate, attempted to be created by a will, fails because it offends the rule against perpetuities, the property thus ineffectually disposed of vests at once in the heir or heirs at law; and a rent charge on the abortive future estate during the illegal interim of suspension fails therewith.

Appeal from Cloud district court; JOHN C. HOGIN, judge.  
Opinion filed March 9, 1918. Affirmed.

C. L. Kagey, of Beloit, M. V. B. Van De Mark, and A. M. French, both of Concordia, for the appellants; Fred W. Sturges, jr., of Concordia, guardian *ad litem* for minor appellants.

Park B. Pulsifer, C. L. Hunt, both of Concordia, and W. H. Savary, of Chicago, Ill., for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was an action by the plaintiff, Celina Lasnier, widow and sole heir at law of the late Alfred Edmond Lasnier of Cloud county, to quiet her title to certain property which had belonged to her deceased husband. Alfred Edmond Lasnier left a will, the material parts of which read—

"First, I bequeath to my wife, Celina Lasnier all the income, real estate and personal property that I own, as long as she lives a widow. If she remarries she will have right to what the law allow her only.

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"Second, I oblige her after receiving my life insurance, which is in her name, to pay \$500 to the parish of Concordia for masses to be said for me to the above amount, within a year after my death.

"Third, I oblige her to give \$500.00 to my sister, Emeline Lasnier, Sister in the Convent of Presentation of Marie, in St. Hyacinthe, Canada, under the name of Sister Theresa.

"Fourth, I devise [advise] her to sell the farm and all of the stock and implements, but I desire that the store shall not be disposed of in any manner within 21 years after the death of my beloved wife. And in the meantime during the 21 years, the building to be kept in repair out of the income of same building and the balance to be equally divided amongst my brothers and sisters.

"Fifth, after 21 years elapse after the death of my beloved wife, should the building be sold the amount to be divided amongst and between the children of my brothers and sisters that have remained good Catholics and good citizens.

"I appoint my beloved wife, Celina Lasnier, the executrix of this my last will and testament."

The plaintiff elected to take under the law, and not under the will. As executrix she paid the bequests mentioned in the second and third paragraphs of the will, and brought this action against all the next of kin of her husband who might have some claim of right under the fourth and fifth clauses of his will, basing her action on the ground that those clauses of the will were void, and that there was a partial intestacy of her husband's estate which devolved upon her as his sole heir at law.

The trial court gave judgment for plaintiff on the ground—

"That the will of Alfred Edmond Lasnier as to the fourth and fifth clauses thereof is void and of no effect because of ambiguity, uncertainty, and remoteness, and also because of the reason that the said clauses violate the rule against perpetuity."

Certain of the defendants appeal.

The appellee raises a preliminary question by moving to dismiss this appeal because no transcript of the evidence was provided by the appellants. But, unless the questions involved in the appeal require a review of the evidence or of the rulings of the court thereon, a transcript would serve no purpose. Failure to provide a transcript does not necessarily require the dismissal of an appeal; it merely excludes from the scope of the review those features of the lawsuit dependent thereon. In this case, apparently, there was some evidence introduced at

the trial, but we do not discern its relevancy to the matters now urged upon our attention.

Were the fourth and fifth clauses of the will void, as decided by the trial court? Let us test them by the rule against perpetuities. That rule is that no future interest in property can lawfully be created which does not necessarily vest *within* twenty-one years after some life or lives now in being, excluding from such computation of years the incipient life of infants *in ventre sa mere*.

In *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 682, it was said:

"If by the terms of the will no estate could vest in the children of either son who died leaving a widow until her death or remarriage, the rule against perpetuities was violated, because it might happen that the son would marry a woman born after his father's death, who would survive him more than twenty-one years. The improbability of such an occurrence does not affect the matter. 'The rule requires that future interests within its scope should vest within twenty-one years, exclusive of periods of gestation, after a life or lives in being. . . . It is not enough that the future interest may, or even that it will, in all probability, vest within the limits. It must necessarily so vest.' (30 Cyc. 1482, 1483.) If, however, an estate would necessarily vest in such children at or before the death of their father, the rule was satisfied, no matter how long their possession and enjoyment of the property might be postponed. (30 Cyc. 1471, 1473; 22 A. & E. Encycl. of L. 721, 722; *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, a case somewhat like the present; Note, 49 Am. St. Rep. 126.) The question for determination therefore is, When would an estate vest in the children of one of the sons under the circumstances stated? If the actual and obvious purpose of the testator was one which the law does not permit to be carried out, the provision of the will must fail." (p. 548.)

In *Keeler v. Lauer*, 73 Kan. 388, 393, 85 Pac. 541, it was said:

"The trust is to terminate and the property to pass to the children when the youngest child arrives at the age of twenty-one years. Having no statute on the subject the common-law rule prevails, under which the contingent interest must become vested within a life or lives in being and twenty-one years afterward, to which, under some circumstances, is added the period of gestation. (22 A. & E. Encycl. of L. 708; Gray, Rule against Perpetuities, 2d ed., § 201.) If the contingency on which the estate is to vest must certainly happen within the common-law period, it does not offend the rule. As the minority of the youngest child comes within the gross period added to a life in being there is no room for disagreement. It is held, too, that the term of twenty-one years may be



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taken in gross, without reference to infancy, and the devise is not too remote if the contingency must happen within that period. (*Barnitz's Lessee v. Robert Casey*, 11 U. S. 456, 468, 3 L. Ed. 403; *Potter v. Couch*, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Johnston's Estate, Johnston's Appeal*, 185 Pa. St. 179, 39 Atl. 879, 64 Am. St. Rep. 621; *Cadell v. Palmer*, 1 Cl. & F. [Eng.] 372; *Von Brockdorff v. Malcolm*, 30 Ch. Div. 172; Gray, *Rule against Perpetuities*, 2d ed., §§ 186, 223; 22 A. & E. Encycl. of L. 709.)" (p. 393.)

The rule against perpetuities has received the sanction of lawyers and statesmen for many generations, both in America and England; and it is grounded on the salutary and far-sighted public policy which frowns on the total exclusion of property from social commerce for long periods of time. Such exclusion is at variance with that philosophy of government which encourages the accumulation of private property in such form that it may readily be used or disposed of to provide against the possibilities of future want or misfortune. Chancellor Kent's examination of the early English cases led him to say that perpetuities had led to confusion and disorder and had often caused the entanglement and ruin of families. (4 Kent's Commentaries, 267, 268.) Professor Gray declares that the rule is not of feudal origin, but has its support in the practical needs of modern times. (Gray, *The Rule against Perpetuities*, § 203.)

Sir William Blackstone, in discussing the rule against perpetuities, says:

"But, in . . . these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors; because by perpetuities . . . estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards." (Cooley's Blackstone, Book II, 173, 174.)

In the present case, the plaintiff, as was her privilege, disclaimed under the will and claimed her right to half the estate under the statute. What then became of the other half of the estate after paying the specific bequests? The will says the store building is not to be disposed of in any manner within

twenty-one years after plaintiff's death. After that time it is to vest, or the proceeds of it are to vest, in certain persons whose identity need not at this point concern us. It is not within twenty-one years after some life now in being, but after that time—beyond that time—that the proceeds of this property are to vest according to this will. Certainly this provision of the will offends the rule against perpetuities. And when a proposed future estate fails because of the rule against perpetuities, the property vests at once in the heir or heirs at law. (*In re Walkery*, 108 Cal. 627, 49 Am. St. Rep. 97, and note; *Kountz's Estate*, 213 Pa. St. 390, 3 L. R. A., n. s., 639; *Cooley's Blackstone*, Book II, 156, 157; *Gray, The Rule against Perpetuities*, §§ 247, 248.) The rent charge on the property, being for the proposed illegal term of suspension or postponement of the vesting of the estate, necessarily fails with the failure of the abortive estate itself.

In view of the foregoing, it seems wholly unnecessary to decide whether the provisions of the will creating a future estate to vest finally in such of the testator's kinsmen as had "remained good Catholics and good citizens," without prescribing a mode of determining these requisite qualifications of beneficiaries to take under the will, are void for uncertainty. If the will had created and bestowed a power of appointment, or if it had prescribed some other definite and suitable mode of determining who among the testator's nephews and nieces possessed the requisite qualifications, there might be no such uncertainty as would vitiate the devise or bequest. (40 Cyc. 1708.)

It is suggested in appellants' brief that the store building did not amount to one-half of the testator's property. Probably so, but aside from the building the will does not attempt to regulate the disposition of any residue. The testator advised his widow to sell the farm, etc., but failed to direct a disposition of the proceeds of such sale. There, too, the will discloses a partial intestacy. All the property ineffectually disposed of by the will devolved on the plaintiff as sole heir at law.

The judgment is affirmed.

No. 21,149.

NELLIE BOYD EVANS, *Appellee*, v. THE WOODMEN ACCIDENT ASSOCIATION, *Appellant*.

## SYLLABUS BY THE COURT.

1. ACCIDENT INSURANCE—*School Teacher—Injury from Cutting Down Tree—No Change of Occupation.* A clause in an accident insurance contract provided that if the insured was injured "while engaged temporarily or otherwise, in any occupation, work, risk or exposure classified by this Association as more hazardous than that under which this certificate is issued, or while doing any part of the work of any one so classified, I or my beneficiary shall be entitled only to the benefits provided by this Association in its classified tables for such increased hazard," and the insured, who had been in charge of city schools for years and was classified in the certificate as superintendent of a city school, was accidentally killed while cutting down a tree, about six months after the end of the term of school, in order to obtain firewood for his father. Occasionally, while teaching and in vacations, he did some work on his farm near the school and some chores for his father. In a contest as to the extent of the benefits due, it is held that the clause quoted applies to occupations rather than to casual or incidental acts which might pertain to occupations other than those named in the certificate, and that, under the testimony in the case, the jury was justified in finding that the insured had not changed his occupation, and that the work he was doing when he was killed pertained as much to that of a teacher as to that of a farmer.
2. SAME—*Policy Obscure—Proper Construction.* The general rule is that if the terms of an accident policy are obscure or open to more than one construction, that one which is more favorable to the insured must prevail.

Appeal from Sedgwick district court, division No. 2; THORNTON W. SARGENT, judge. Opinion filed March 9, 1918. Affirmed.

*Chester I. Long, Austin M. Cowan, and James G. Martin*, all of Wichita, for the appellant; *E. J. Hainer, and C. P. Craft*, both of Lincoln, Neb., of counsel.

*George A. Neeley*, of Hutchinson, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: Nellie Boyd Evans recovered a judgment against the Woodmen Accident Association in the sum of \$3,222, upon a certificate issued by the association to her husband, William E. Evans, now deceased. The defendant appeals.

On May 26, 1913, when the certificate of membership in the association was issued to Evans, and for several years prior thereto, his profession was that of public-school teacher, and at the time of the issuance of the certificate he held the position of superintendent of public schools at Mulvane, Kan., and his occupation was so stated in his application for membership and in the certificate. For several years prior to his death he was also the owner of a tract of farm land, and adjoining this tract was a small tract upon which his aged and infirm father lived alone. The deceased lived in town, not far from his school, but it had been his custom, when not engaged in his regular duties as a teacher, to go to the farm and do some of the work there, mainly in the mornings and evenings, and aid his father in doing chores and in caring for the few head of stock kept on the farm. It was provided that the application of the insured, the by-laws of the association, and the certificate issued should together constitute the whole contract between the parties. Among the provisions of the application was the following:

"I hereby agree that if I am accidentally injured, fatally or non-fatally, while engaged temporarily or otherwise, in any occupation, work, risk or exposure classified by this Association as more hazardous than that under which this certificate is issued, or while doing any part of the work of any one so classified, I or my beneficiary shall be entitled only to benefits provided by this Association in its classified tables for such increased hazard."

The classification of risks in force at the time the certificate was issued was as follows:

| Occupation.                             | Risk.          | Benefits. |
|---|----------------|-----------|
| "Teacher school, city.....              | Select .....   | \$3,000   |
| Teacher school, country or village..... | Ordinary ..... | 1,500     |
| Farmer owner, truck raiser .....        | Medium .....   | 1,000     |
| Farmer owner, or renter .....           | Medium .....   | 1,000     |
| Farm laborer, hired hand.....           | Special .....  | 800"      |

In May, 1914, Evans' term as superintendent expired and he did not thereafter secure any employment or contract of employment as a teacher or superintendent of schools. During the summer of 1914 he made a campaign for the office of county

treasurer and also spent some of his time working on the farm. After being defeated for that office at the general election in the fall, he spent considerable time working at the farm or overseeing others working there and in aiding his father. However, he did not depend upon the farm as a means of support for himself and family. After the election, efforts were made by him to obtain another position as teacher, and he considered an offer of a position in the town of Corbin, but it does not appear that he arranged to take that position. In connection with his work as a teacher, and up until the time of his death, he was a member of the county board which conducted examinations of teachers and graded their examination papers. Evans also received a certificate as a licensed normal teacher about the time his term as superintendent expired. He was killed on December 24, 1914, when a cottonwood tree upon his farm, which he was cutting down for fuel for his father, fell upon and crushed him. Among other findings, the jury found that deceased never changed his occupation after his term as superintendent expired; that his activities after June, 1914, consisted of being a member of the examining board, campaigning for the office of county treasurer, and taking his usual recreation on the farm; that the work he was doing when he was killed was connected with and related to the occupation of teacher, and did not pertain to that of a farmer.

The certificate provided for the payment to the beneficiary of \$3,000 in case of death by external, violent, and accidental means, and it was conceded that Evans' death was so caused. Prior to this action and at the trial defendant made a tender of \$1,000 to plaintiff, as the extent of its liability under the certificate. It is contended by defendant that the deceased was injured while temporarily engaged in the work of a farmer, and that he was doing part of the work of his father, a farmer, and, therefore, that plaintiff could not recover more than the amount allowed for such risks. It is clear that the occupation of the insured was that of school teacher. He had served as superintendent of the schools of Mulvane for seven years, and before that time had been engaged as teacher of the common schools of that city. The fact that during this period he had occasionally done some work on his farm and chores for his father, who was a retired farmer, did not operate as a

change of vocation nor make him a farmer, "temporarily or otherwise." His unsuccessful candidacy for an office during the vacation period cannot be interpreted as a change of occupation. There was testimony that the work done by him on the farm and for his father was his means of obtaining exercise and recreation, and the jury have found that there was no change of occupation, and that between the ending of the term of school and the time of his death in December of the same year the only work done by him was acting as a member of the examining board, an unsuccessful effort to be elected as county treasurer, and his usual recreation on the farm. Some time before his death some steps had been taken by him to obtain another position as school teacher, and it is plain that he had not abandoned his calling. The things done by him upon the farm were casual, and might be said to be incidental to his work as a teacher. Clauses like the one in question, limiting the insurer's liability where the insured is injured while engaged in an occupation classified as more hazardous than that named in the certificate, are generally held to apply to occupations rather than to acts that are merely casual or incidental. The terms "work, risk or exposure" pertain to a classified occupation more hazardous than that under which the certificate is issued.

In *Willey v. Sheppard*, 61 Kan. 351, 59 Pac. 651, it was held that one insured against accident as a barber and restaurant keeper, who was injured while hunting, might recover, although hunting might be classed as a more hazardous occupation. The hunting was treated as a matter of recreation incident to the daily life of the insured, and, not being for profit or hire, could not be regarded as even a temporary change of occupation. In that case there is a quotation with approval from *Union Mutual Accident Ass. v. Frohard*, 134 Ill. 228, in which it was said:

"The word 'occupation' . . . must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation." (p. 234.)

Cutting down a tree was not the usual work of the insured, and may be said to be as incidental to school teaching as it would

be to farming and many other vocations. It is not easy to say what particular acts are properly incidental to one vocation and not to another. If an insured lawyer should occasionally cut down a dead tree in his orchard or yard, his acts could hardly be treated as a change of calling any more than the chopping down of a tree now and then by the Prime Minister Gladstone effected a change of his vocation. Occasional acts of that kind may be properly treated as incidental to almost any of the callings or occupations. The filial act of the insured in cutting wood for his father's use cannot be regarded as the act of a farmer, and, besides, his father had retired from the occupation of farming. It did not make him a farmer or wood-chopper any more than to have carried his father's mail occasionally would have made the insured a mail carrier.

In *Stone's adm'rs v. United States Casualty Co.*, 34 N. J. Law, 371, the insured was classified in the policy as a school teacher, and, being temporarily out of employment, he caused two buildings to be erected for his own use, and while examining the work as it progressed he fell from the second story and was killed. The clause relating to a change of occupation or any exposure more hazardous than that named in the policy was held to apply to occupations and not individual acts, and it was said that it would be preposterous to affirm that because of the building of these two houses he thereby became a builder by profession. It was held that the jury were warranted in finding that the act of the assured which led to his death was not an act that was more appropriately incident to other occupations than it was to that of a teacher.

Although there is some conflict of authority, the general trend of the cases is that casual or incidental acts pertaining to another employment than that named do not constitute a change of employment within the meaning of clauses like that under consideration; neither do they operate as a forfeiture or reduction of the amount of benefits. In a note in 7 A. & E. Ann. Cas. 568 many authorities are collected in support of the rule, which is stated as follows:

"In construing insurance policies which contain provisions for changes in the occupation of the insured, or which classify risks according to occupation, it is the general rule that to be engaged in a certain occupation or employment is not inconsistent with the incidental performance of

acts, either of service or pleasure, which do not come within the stated vocation of the insured, and that the doing of such acts does not operate to remove the insured from the vocation in which he is classed."

Later cases to the same effect are collected in Ann. Cas. 1916 B, 740. Another statement of the rule applicable where a forfeiture or reduction of benefit is claimed by reason of a change of occupation or of temporary or occasional acts and exposures pertaining to an occupation classed as more hazardous than that named in the policy, with a long list of supporting authorities, is set forth in L. R. A. 1915 D, 312. It is there said that—

"Clauses in accident policies providing for a forfeiture or reduction in the sum payable if the insured is injured or killed in any occupation or exposure classed as more hazardous than that under which he was classified have frequently been before the courts. There has been little difference of opinion as to the applicability and effect of such provisions as applied to cases where the insured was injured while performing an occasional act relating to a more hazardous occupation, it being generally held that the classification intended by such provisions is a classification of occupations, and not of particular acts or exposures, and that therefore the fact that the insured occasionally performs acts pertaining to a more hazardous occupation does not have the effect of forfeiting the policy or reducing the amount of recovery."

(See, also, Note in 24 L. R. A., n. s., 1174.)

A few cases taking a different view of such clauses, and giving them a strict interpretation as against the insured, may be found in these notes. The general rule is that if there is doubt as to the construction of such provisions, that which is most favorable to the insured must prevail. (*Casualty Co. v. Colvin*, 77 Kan. 561, 568, 95 Pac. 565; *Stone's adm'rs v. United States Casualty Co.*, supra.)

The instructions of which complaint is made follow closely the rule laid down in *Willey v. Sheppard*, supra, and the other authorities which are herein cited and approved. We find no good ground for the claim that the verdict was given under the influence of passion and prejudice.

The judgment of the district court is affirmed.



No. 21,224.

AUGUST BURZIO, by his next friend, PAULINE BURZIO, *Appellee*,  
v. THE JOPLIN & PITTSBURG RAILWAY COMPANY, *Appellant*.

## OPINION ON REHEARING.

Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion modifying former opinion filed March 9, 1918. (For original opinion of affirmance see *ante*, p. 287.)

*John P. Curran*, of Pittsburg, and *S. L. Walker*, of Columbus, for the appellant.

*C. A. McNeill*, and *Maurice McNeill*, both of Columbus, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: In a petition for a rehearing, the defendant challenges the correctness of a statement made in the opinion found in *Burzio v. Railway Co.*, 102 Kan. 287. That statement is as follows: "It is urged that the findings of the jury are contradictory to each other." (p. 292.) The defendant contends that this matter was not presented. An examination of the defendant's brief discloses that the contention is correct. This matter was not urged as a ground for reversing the judgment of the trial court. The opinion that has been rendered is modified by striking out all reference to the findings of the jury being contradictory to each other. With this modification the opinion is adhered to.

No. 21,247.

CLAYTON L. STUART, *Appellee and Appellant*, v. THE CITY OF KANSAS CITY, *Appellant and Appellee*.

## OPINION DENYING A REHEARING.

Appeal from Wyandotte district court, division No. 3; ALBERT J. HERROD, judge. Opinion denying a rehearing and directing a new trial on certain questions filed March 9, 1918. (For former opinion of reversal see *ante*, p. 307.)

*H. J. Smith, Thomas M. Van Cleave, and Lee Judy*, all of Kansas City, for the appellant and appellee.

*J. O. Emerson, and David J. Smith*, both of Kansas City, for the appellee and appellant.

The opinion of the court was delivered by

MARSHALL, J.: In an opinion rendered on January 12, 1918 (102 Kan. 307), the judgment of the district court was reversed, and a new trial was granted.

The plaintiff has filed an application for a rehearing, and, in that application, asks that, if a rehearing is denied and the judgment stands reversed, the new trial be directed on the proposition on which the judgment was reversed. The judgment was reversed on the ground that an instruction was erroneous because it did not submit to the jury the question of the defendant's knowledge of the dangerously playful habits of William Deeds, a fellow workman with whom the plaintiff was working at the time of his injury.

The judgment of reversal is adhered to, and a new trial is granted on the following questions: (1) Was the plaintiff injured by William Deeds, accidentally or in sport? (2) If the plaintiff was injured by William Deeds in sport, was William Deeds in the habit of indulging in dangerous play with his fellow workmen? (3) If William Deeds was in the habit of indulging in dangerous play with his fellow workmen, did the defendant have notice or knowledge of that habit?

After these facts have been ascertained, judgment will be rendered by the trial court in accordance with the facts so found and in obedience to the law declared in the former opinion.

No. 21,326.

THE NATIONAL BANK OF WEBB CITY, MISSOURI, *Appellee*, v.  
S. S. DICKINSON et al., *Appellants*.

## SYLLABUS BY THE COURT.

1. **PROMISSORY NOTE—Makers Primarily Liable.** Those who sign a promissory note as makers are primarily liable thereon.
2. **SAME—Negotiability Not Destroyed.** A note signed by five joint makers contained this language:

"We, the makers, sureties, endorers and guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof to any of the sureties of this note."

*Held*, that such note is negotiable.

3. **SAME—No Surety Indicated on Note.** Under the law as expressed in the negotiable-instruments act there was nothing on such note to indicate that any party thereto was a surety, and the quoted sentence was meaningless and did not render the instrument a courier impeded with luggage.

Appeal from Pawnee district court; ALBERT S. FOULKS, judge. Opinion filed March 9, 1918. Affirmed.

*F. Dumont Smith*, of Hutchinson, and *E. E. Glasscock*, of Larned, for the appellants.

*W. H. Vernon*, *W. H. Vernon, jr.*, *J. S. Vernon*, all of Larned, and *Frank L. Forlow*, of Webb City, Mo., for the appellee.

The opinion of the court was delivered by

WEST, J.: The defendants appeal from a judgment rendered against them on a promissory note taken by the plaintiff for value before maturity in due course, the complaint being that it was nonnegotiable and subject in the hands of the plaintiff to the defense of failure of consideration.

The only question is the negotiability of the note, and this depends upon the proper construction of the following provision thereof:

"We, the makers, sureties, endorers and guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof to any of the sureties of this note."

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Following this are the five names of the makers.

The defendants argue that as the note was made and is payable in Kansas it is governed by our law, and that under the authority of *Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, and *Nelson v. Southworth*, 93 Kan. 532, 144 Pac. 835, the quoted language renders the instrument nonnegotiable.

The plaintiff relies on section 6528 of the General Statutes of 1915, which requires, among other things, that the paper must be payable on demand or at a fixed or determinable future time, and section 6531, which defines a determinable future time as a fixed period after date or sight, or on or before a fixed or determinable future time specified therein, or on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain. (*Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239.) It is further contended that as there are no sureties on the note the clause providing for extension without notice to sureties is without effect.

While the quoted language mentions sureties, the form of the note would indicate that all the signers are makers. True, as held in *Water Power Co. v. Brown*, 23 Kan. 676, the form of the paper does not prevent inquiry, in an action between the parties liable thereon, as to who are principals and who sureties. But section 3 of the negotiable-instruments act provides that—

“The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same.” (Gen. Stat. 1915, § 6523.)

(See, also, Gen. Stat. 1915, § 6587; *Bank v. Bowdon*, 98 Kan. 140, 157 Pac. 429.)

In *Bank v. Gunter*, 67 Kan. 227, 62 Pac. 842, the makers and indorsers waived protest, demand, and notice, but also, in case it should not be paid at maturity, agreed to all extensions and partial payments before or after maturity, without prejudice to the holder, and the note was held to be not negotiable. The court said it lacked the element of certainty as to time of payment, and that the provision just referred to made the time indefinite by stipulating that it might be changed and extended either before or after maturity.

“If the time is to remain fixed until maturity when another time is to be fixed by the parties, or if payment is made to depend upon

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events which necessarily must occur and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time named in the paper is subject to change at any time at the volition of some of the parties to the paper." (p. 231.)

In that case the agreement to an extension was consented to in advance by the makers and indorsers, while here the agreement was only to the effect that the time of payment might be extended without notice to any of the sureties, which, of course, did not cover makers, indorsers and guarantors, as distinguished from sureties. The case of *Bank v. Heslet*, 84 Kan. 315, 113 Pac. 1052, was under the negotiable-instruments act. There the makers and indorsers waived presentment for payment, notice, exemptions, valuation and appraisement, "and each signer and indorser makes the other an agent to extend the time of this note." (Syl.) It was said that the precise inquiry was whether the authority to extend could be exercised only after maturity; that if so, the authority to extend would only amount to a waiver of the right to be relieved from liability for an extension without such authority, but if it gave the right to extend before maturity, it would be the same as if the words "on or before" had been inserted. It was further stated that this extension clause did not indicate whether the extension should be made before or after maturity, and that ordinarily it would be made before the note should fall due.

"The vice of the stipulation in question is that the day of payment cannot be determined. The signer (maker) or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder." (p. 319.)

The Gunter case was approved and the note was held not negotiable, not having "the element of certainty in time of payment necessary in commercial paper." (p. 320.) In each of these cases there was an express agreement to extend.

The note in the case now before us contains no agreement to extend, except that the time of payment may be extended without notice thereof to any of the sureties. If there be no sureties, then of course there could be no notice to them. Counsel argues that whenever it is necessary to examine into the provisions of an instrument to see whether it is negotiable or not its negotiability is lost, and that it was necessary in this case to so examine, and that, as a matter of fact, each

maker is a surety for the various other makers in proportion as each was to divide up the stock for which the note was given. Section 6648 of the General Statutes of 1915 provides that a person secondarily liable is discharged.

"(6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

In the cited case of *Bank v. Bowdon* it was held that a co-maker, although in fact a surety, is not released by an extension granted the principal in consideration of the payment of interest in advance. Speaking of the rule holding the surety liable it was said:

"It merely defines the obligation of one who upon the face of a negotiable instrument assumes unconditional liability. It requires a surety who is unwilling to bind himself, irrespective of any extension granted to a comaker, to refrain from signing a note as one of the makers. (p. 142.)

One of the two makers pleaded suretyship, want of consideration, and an extension by the other without her consent by payment of advance interest. While it was said that aside from the statute the same result would be reached, the surety was held liable by virtue of the negotiable-instruments act. Ruling Case Law lays it down that under the provisions relating to primary and secondary liability,

"A surety comes squarely within the definition of a person whose liability is primary, for he is, by the terms of the instrument, absolutely required to pay the same." (3 R. C. L., p. 1120, § 335.)

In *Mullendore et al. v. Wertz*, 75 Ind. 431, it was held that an extension agreement between the payee and one of two makers of a note, without the knowledge or consent of the other, who was a surety in fact but not known as such to the payee, did not have the effect to release the nonconsenting maker. The consideration in that case was the payment of advance interest.

Section 6648 provides that a person secondarily liable is discharged, among other things, by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. But as already seen, neither party to this note can be said to be

secondarily liable, for each is primarily liable. We then have a promissory note signed by five makers, each and all of whom are primarily liable for its payment, and by no one else, the signature of no other person or party appearing thereon. The provision that the time of payment may be extended without notice to any of the sureties and the recital that this is made by the sureties do not necessitate any examination or investigation, for the purpose of ascertaining by a purchaser in due course before maturity whether any party can, as to the holder, claim the right to mere suretyship, and hence the note is not rendered nonnegotiable or made into a courier impeded with luggage.

If all the makers agree in advance that the note may be extended, this amounts merely and only to the unnecessary consent that they may enter into a new contract when they get ready to do so. If they all agree that the note may be extended by some of them without notice to the others, this might, and probably would, mean that in case of a valid agreement for extension between the holder and such others those not entering into it would be bound thereby, because such provision would amount to a mere appointment in advance of the other makers to represent them in an extension agreement. But a stipulation by all the makers of the note, reciting that they and the sureties consent that it may be extended without notice to any of the sureties, does not amount to an agreement that it may be extended by any of the makers without consent of the others or to an appointment of any of them as agents to extend for such others. It is apparent that in this instance a blank note prepared for use when principals and sureties were to sign, was used, and hence the language which has caused this controversy became impractical and meaningless.

The judgment is affirmed.

No. 21,328.

FRANK E. DEFENBAUGH, *Appellee*, v. THE UNION PACIFIC  
RAILROAD COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. NEGLIGENCE—*Evidence*. There was evidence to support the plaintiff's allegation of negligence.
2. NEGLIGENCE—*Unprotected Railroad Repair Shops—Injury to Employee*. Under section 8545 of the General Statutes of 1915, a railroad is liable for the injuries sustained by a car repairer who is blown by the wind from the top of a car on which he is working, where the car is being repaired in regular shops, at a division point, on tracks exclusively used for repair work, and is not in or under any shed.
3. SAME—*Car Repairer—Not Engaged in Interstate Commerce*. A car repairer cannot be said to be engaged in interstate commerce while working on a car which has been used in such commerce and which, while being repaired, is empty and is not used in any kind of transportation, where it does not appear that the car is used exclusively in interstate commerce.
4. SAME—*Contributory Negligence—Assumption of Risk*. Under sections 8480, 8481, and 8482 of the General Statutes of 1915, neither contributory negligence nor assumption of risk is a defense in an action to recover damages for injuries sustained by a car repairer, under the circumstances described in the second paragraph of this syllabus.

Appeal from Wyandotte district court, division No. 1; EDWARD L. FISCHER, judge. Opinion filed March 9, 1918. Affirmed.

R. W. Blair, T. M. Lillard, and A. M. Hambleton, all of Topeka, for the appellant.

Arthur J. Stanley, and Guy E. Stanley, both of Kansas City, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendant appeals from a judgment rendered against it in favor of the plaintiff for injuries sustained by him.

The plaintiff, a car repairer, was injured by being blown from the top of a freight car on which he was working. At



the time of his injury the plaintiff was employed by the defendant in its regular repair shops in Kansas City, Kan., one of the defendant's division points. The car on which the plaintiff was working was standing on a track used exclusively for repair work, but was not covered nor enclosed by any shed. There were sheds connected with the repair shops, but the sheds were full, and there was no room in them for the car on which the plaintiff was working. The plaintiff was removing sheet metal from the roof of the car. After the metal had been loosened, a gust of wind caught it and blew it and the plaintiff to the ground. On the day the plaintiff was injured the wind was blowing from forty to forty-five miles an hour.

The petition alleged that the defendant was negligent in not having the car on which the plaintiff was working in a shed which could have been closed so as to prevent the wind from catching and blowing the metal roof off the car. Contributory negligence, assumption of risk, and that the plaintiff was engaged in interstate commerce at the time of his injury, were alleged as defenses.

1. The defendant's first contention is that there was no evidence to support the plaintiff's allegation of negligence. Section 8545 of the General Statutes of 1915 reads:

"It shall be unlawful for any railroad company or corporation or other persons who own, control or operate any line of railroad in the state of Kansas to build or repair railroad equipment at division points where shops are located without providing sheds, so constructed that they may be entirely enclosed, over the tracks exclusively used for such repair work, so that all men permanently employed for such repairs may be protected during storms or other inclement weather or from extreme heat: *Provided*, Nothing in this act shall relate to temporary repairs made at places other than regular shops."

The statute applied to the work that was being done by the plaintiff. The evidence supported the charge of negligence set out in the petition.

2. The defendant's second contention is that its negligence in failing to provide a shed for the repair track was not the proximate cause of the plaintiff's injury. The contention cannot be harmonized with the requirements of the statute. The wind was the direct cause of the injury to the plaintiff. If the statute had been complied with the accident would not have

occurred. The purpose of the statute which has been quoted, is to protect employees from being injured by inclement weather of any kind—heat or cold, rain or snow, wind or storm. The statute was not complied with, and because it was not complied with the plaintiff was injured. Injury to an employee caused by inclement weather could have been foreseen by the defendant as a result of its failure to comply with the statute. The injury that did result was one of those that might have been thus foreseen. High winds occur frequently in this state, and metal roofs are often torn from buildings by such winds. A person working on a loosened metal roof of any structure during a high wind in this state is liable to be injured. The statute was intended to compel the defendant to guard against the thing that caused the plaintiff's injury. There was, therefore, causal connection between the violation of the statute and the injury to the plaintiff, and the defendant's contention cannot be sustained. Substantial support for the conclusion here reached is found in *Fowler v. Enzenperger*, 77 Kan. 406, 413, 99 Pac. 995; *Caspar v. Lewin*, 82 Kan. 604, 625, 109 Pac. 657; *Casteel v. Brick Co.*, 83 Kan. 533, 537, 112 Pac. 145.

3. The defendant's third contention is that the plaintiff was employed in interstate commerce at the time of his injury. The car on which the plaintiff was working was an empty Union Pacific car. The accident occurred on November 19, 1915. The car had been used in the regular commercial service of the defendant. On November 16, 1915, it was received from the Wabash railroad after it had completed an interstate trip. It was then inspected, found in bad order, and placed in the yards for repairs. While undergoing repairs it was entirely out of commercial service and was not used for any commercial purpose. On November 22, 1915, after it had been repaired, it was again put into commercial service. It does not appear whether the first service of the car, after being repaired, was in interstate commerce or in intrastate commerce, and it does not appear that the car was used exclusively for service in interstate commerce.

There has been some confusion in the decisions in both the state and federal courts concerning the interstate character of work similar to that performed by the plaintiff. An analogous

case was decided by the supreme court of the United States on January 8, 1917, *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, where that court said:

"The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and . . . it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events." (p. 356.)

Following the reasoning of the United States supreme court, the conclusion is inevitable that the plaintiff was not engaged in interstate commerce at the time he was injured.

4. The defendant's last contention is that the plaintiff was guilty of contributory negligence, and had assumed the risk. This contention is not good. Section 8481 of the General Statutes of 1915 reads:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 8482 of the General Statutes of 1915 reads:

"That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employee[s] shall not be held

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Biernacki v. Ratzlaff.

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to have assumed the risk of his employment in any case where the violation by such common carrier, its officers, agents, servants, or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee."

These statutes apply against all corporations operating railroads, in all cases of—

"Injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier; or by reason of any insufficiency of clearance of obstructions, of strength of roadbed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their coemployees, or of any other insufficiency, or by reason of any defect, which defect is due to the negligence of said employer, its officers, agents, servants or other employees in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves, or other equipment." (Gen. Stat. 1915, § 8480.)

The failure of the defendant to provide a shed over the track on which the car was standing while being repaired, or to place the car in a shed, contributed to the plaintiff's injury, and neither contributory negligence nor assumption of risk is a good defense.

The judgment is affirmed.

No. 21,336.

JOSEPH BIERNACKI, *Appellee*, v. JOHN RATZLAFF, *Appellant*.

SYLLABUS BY THE COURT.

1. AUTOMOBILES—*Collision—Verdict—Judgment*. Rule followed that a verdict and judgment supported by substantial though conflicting evidence cannot be disturbed on appeal.
2. SAME—*New Trial—Cumulative Evidence—Judicial Discretion*. Rule followed that the production of cumulative evidence in support of a motion for a new trial is addressed to the sound discretion of the trial court and does not require the granting of a new trial as a strict matter of right.
3. SAME—*Evidence—Verdict and Judgment*. Evidence examined, and held sufficient to support a verdict and judgment for damages arising from a collision of automobiles on the public highway.

Appeal from Ford district court; LITTLETON M. DAY, judge. Opinion filed March 9, 1918. Affirmed.

*J. B. Hayes*, of Minneola, for the appellant.

*L. A. Madison*, and *Carl Van Riper*, both of Dodge City, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was an action and a cross action for damages arising from a collision of two automobiles on the public highway.

The plaintiff's petition, in substance, alleged that on the evening of February 19, 1916, he was driving his automobile southward on the west side of the public road at a moderate rate of speed, and that the defendant was driving his automobile northward on the west side of the road (wrong side for defendant) at a high and dangerous rate of speed, and through this negligence of the defendant a collision occurred which injured the plaintiff and damaged his machine.

The defendant's answer denied plaintiff's allegations, and in a cross petition he alleged that he was driving northward on the east side of the road at a moderate rate of speed, and that the plaintiff was driving his car southward on the east side of the road (wrong side for plaintiff) at a high and dangerous rate of speed, and that through this negligence of plaintiff the collision occurred which injured the defendant and damaged his machine.

The cause was tried to a jury, which returned a verdict for plaintiff for \$350, and judgment was rendered thereon.

Defendant assigns two errors: (1) that the verdict was contrary to the evidence, and (2) that he was entitled to a new trial on his showing of newly discovered evidence.

The court has read the abstracts of the evidence with care, and it cannot be said that the verdict was contrary to *all* the evidence. While the testimony of the witnesses was conflicting, a substantial part of it tended to support the allegations of plaintiff's petition and to support the verdict. The problem for the trial court and jury was simply to determine which of the witnesses were telling the truth and which of them were not. (*Wideman v. Faivre*, 100 Kan. 102, 106, 163 Pac. 619; *Matassarín v. Street Railway Co.*, 100 Kan. 119, 120, 121, 163 Pac. 796.)

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The State, *ex rel.*, v. Drainage District.

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In support of the motion for a new trial the defendant produced affidavits of several new witnesses, which tended to prove that the tracks of plaintiff's automobile were on the east side of the road, where plaintiff's car, under the circumstances, had no right to be, and that the broken glass of the defendant's wind shield was on the east side of the road, where his car had a right to be. This evidence would tend to show that the plaintiff, and not the defendant, was the wrongdoer. But there was a good deal of evidence *pro* and *con* on both these phases of the controversy adduced at the trial, and the rule governing the granting of new trials on cumulative evidence controls. (*Strong v. Moore*, 75 Kan. 437, 89 Pac. 895; *Simmons v. Shaft*, 91 Kan. 553, 138 Pac. 614; *Pittman Co. v. Hayes*, 98 Kan. 273, 157 Pac. 1193.)

In appellant's brief there is some discussion of the duty of one who is in danger to avoid that danger when he can do so, and some discussion of the rights, duties and privileges of travelers on the highway; but no error is assigned touching these matters, and nothing can be discerned therein which affects the judgment.

Affirmed.

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No. 21,339.

THE STATE OF KANSAS, *ex rel.* J. B. WILSON, as County Attorney, etc., *Plaintiff*, v. BISMARCK DRAINAGE DISTRICT No. 1, OF DOUGLAS COUNTY, *Defendant*.

SYLLABUS BY THE COURT.

QUO WARRANTO—*Drainage District Supervisors—Tenure of Office—Constitutional Law.* The provision in chapter 168 of the Laws of 1911 fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the constitution; but as the term of office named in the act is void, the tenure is not in fact fixed, and the office is held subject to the appointing power, and therefore the invalid part does not render the whole act void.

Original proceeding in quo warranto. Opinion filed March 9, 1918. Judgment for defendant.

*S. D. Bishop, J. B. Wilson, Mina P. Dias, L. H. Menger, R. E. Melvin, Charles Gilmore, E. T. Riling, and John J. Riling*, all of Lawrence, for the plaintiff.

*Thomas Harley*, of Lawrence, for the defendant.

The opinion of the court was delivered by

JOHNSTON, C. J.: This is an action of quo warranto, in which the plaintiff is challenging the existence of the Bismarck drainage district No. 1 of Douglas county, which was incorporated under the provisions of chapter 168 of the Laws of 1911. The organization of the district was effected on June 15, 1916, and at an election held on July 6, 1916, five supervisors of the district were chosen, who, as the statute provides, determined by lot that their respective terms of office should be for one, two, three, four and five years, and until their successors were elected and qualified. It is provided that after the first election those chosen for supervisors shall hold their offices for a term of five years. (Laws 1911, ch. 168, § 6, Gen. Stat. 1915, § 3997.) The validity of the act is assailed on the ground that it violates section 2 of article 15 of the state constitution, which among other things provides that "the legislature shall not create any office the tenure of which shall be longer than four years." The drainage districts provided for in the act are municipal corporations, and their officers are vested with many important functions, including the condemnation of private property for a public purpose and the levy of taxes on the property within the district. The offices of the district were certainly created by the legislature and necessarily fall within the constitutional limitation which prohibits the fixing of the tenure of the office for longer terms than four years. That provision must therefore be treated as a nullity. The invalidity of the provision, however, does not impair the constitutionality of the whole act, as, the provision being a nullity, the act stands as if it had created the offices and prescribed their duties without fixing the length of their terms. This question was before the court in *Lewis v. Lewelling*, 53 Kan. 201, 36 Pac. 351, where it was held that—

"Where the statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared by law, and the office is held only during the pleasure of the appointing power." (Syl. ¶ 4.)

The same rule was applied in *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207. Under this holding no doubt can arise as to the validity of the acts of the officers done since their election

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because of the unconstitutional tenure, and besides it appears that four of them were chosen for terms not exceeding the constitutional limitation.

The judgment must therefore go in favor of the defendant.

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No. 21,342.

J. P. CANADAY and WINNIE R. CANADAY, *Appellants*, v. FRANK MILLER and JENNIE MILLER, *Appellees*.

## SYLLABUS BY THE COURT.

1. VENDOR AND PURCHASER—*Nonmarketable Title—Specific Performance Refused*. A vendor agreed to make abstracts of title and perfect title to the satisfaction of the vendee. The vendee took the opinion of able lawyers, who advised him the abstracts furnished were insufficient and the title tendered was not marketable, and refused to complete the purchase. *Held*, specific performance should not be decreed.
2. SAME. The evidence relating to the title of real estate in the state of Arkansas considered, and *held*, the title is not marketable under the laws of that state.

Appeal from Miami district court; JABEZ O. RANKIN, judge. Opinion filed March 9, 1918. Affirmed.

*Alpheus Lane, Major Lane, and Charles T. Meuser*, all of Paola, for the appellants.

*B. T. Riley*, of Paola, *James H. Austin*, and *B. Denny Davis*, both of Kansas City, Mo., for the appellees; *William F. Woodruff*, of Kansas City, Mo., of counsel.

The opinion of the court was delivered by

BURCH, J.: The action was one for specific performance, the purpose being to require the defendant to accept title to certain lands in Arkansas. The defendant prevailed, and the plaintiff appeals.

The defendant traded a stock of goods to the plaintiff for land in Kansas and in Arkansas. Possession of the stock of goods was delivered to the plaintiff on certain conditions. The plaintiff furnished abstracts of title to the Arkansas land, which were confessedly defective and which disclosed ques-



tionable title. Afterwards a second contract was made, giving the plaintiff time in which to perfect both his abstracts and his title. The agreement was that the plaintiff would "with all convenient speed proceed at once to have abstracts and title to said land made and perfected to the satisfaction of said Miller." New abstracts were subsequently submitted to the defendant, who, after having examined them, disapproved them and disapproved the title disclosed. The action involved several subjects. With respect to the one under consideration the court made merely a general finding that the plaintiff ought not to recover.

The decision of the district court is sustainable on two grounds.

The abstracts and title were to be made and perfected to the satisfaction of the defendant. He is not satisfied with either. He took the opinion of able lawyers on both subjects, who advised him the abstracts are insufficient and the title is not merchantable. His dissatisfaction is not captious, nor arbitrary, nor feigned, and under his contract he is not obliged to go further. (*LeRoy v. Harwood*, 119 Ark. 418, 178 S. W. 427; *Hollingsworth v. Colthurst*, 78 Kan. 455, 96 Pac. 851; *Read v. Loftus*, 82 Kan. 485, 493, 108 Pac. 850; *Ramey v. Thorson*, 94 Kan. 150, 146 Pac. 315.)

The title tendered was not merchantable. The determination of this question depended on the law of Arkansas. The plaintiff offered in evidence the opinions of Arkansas attorneys. They admitted the plaintiff does not have a record title, and base their opinions that the title is merchantable on adverse possession of a special kind, or on confirmatory actions quieting such title as the plaintiff had by adverse possession. The defendant offered the opinion of an Arkansas attorney, based on decisions of the supreme court of Arkansas, that the title is not merchantable. The evidence of this witness sustains the judgment of the trial court.

Under a statute of the state of Arkansas, payment of taxes, under color of title, on unimproved and uninclosed land, confers constructive possession, which may ripen into title by virtue of the statute of limitations, the same as actual adverse possession. The title thus acquired is title by adverse possession—constructive adverse possession as distinguished from actual

adverse possession. (*Taylor v. Leonard*, 94 Ark. 122.) The plaintiff's title is of the character just described, and in Arkansas, to be marketable, a title must be a clear record title. Title by adverse possession is not marketable, however perfect it may be. (*Mays v. Blair*, 120 Ark. 69, 179 S. W. 331.)

Decrees quieting the plaintiff's title have been entered. The service was by publication of a warning notice to all persons interested. Decrees of this kind may be opened within three years by any person offering to file a meritorious defense, and may be opened by persons under disability—infants, idiots, lunatics, and married women—within three years after removal of disability. The decrees were rendered in November, 1915. This action was commenced in January, 1916. Since the decrees are "not even yet impervious to the attack which under certain circumstances can be made" upon them, the plaintiff's title still rests on adverse possession. (See *Shelton v. Ratterree*, 121 Ark. 482, 181 S. W. 288.)

The plaintiff undertakes to demonstrate that the decrees cannot be opened by anybody. What he succeeds in doing is to show a probability that his title by adverse possession is good. Under the law of Arkansas that kind of a title is not marketable.

The judgment of the district court is affirmed.

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No. 21,343.

HENRY MULL, *Appellant*, v. JAMES BOYLE et al., *Appellees*.

SYLLABUS BY THE COURT.

1. LANDLORD AND TENANT—*Grain Rent—Tenant Pasturing Growing Crop—Rights of Landlord*. Where the owner of land makes a contract with tenants that they are to raise, harvest and thresh a crop of wheat thereon, delivering to him one-third thereof at a railway station, in the absence of any further agreement affecting the matter he has no claim against them for a share of the proceeds of pasturing the growing crop.
2. SAME—*Pasturing Growing Crop—Damage to Land*. In an action by the owner against the tenants under such a contract, for damages done to the land by the pasturage, it is not error to instruct that they had a right to pasture the growing crop, being responsible to the owner for any resulting injury.

Appeal from Clark district court; LITTLETON M. DAY, judge.  
Opinion filed March 9, 1918. Affirmed.

*Robert C. Mayse*, of Ashland, for the appellant.

*Francis C. Price*, of Ashland, for the appellees.

The opinion of the court was delivered by

MASON, J.: Henry Mull, the owner of a tract of land, agreed with James, Charles and Ed Boyle that they were to grow a crop of wheat thereon, delivering to him one-third thereof. The agreement was carried out. Mull thereafter brought an action against the Boyles, alleging that they had, for their own benefit, pastured cattle upon the growing wheat between November and March, and asking judgment for \$120, which he alleged to be one-third of the value of the pasturage. An objection to the introduction of evidence upon this part of the petition was sustained, and from this ruling the plaintiff appeals. A second cause of action was included in the petition, based upon the assertion that the land was injured by pasturing cattle thereon. On this count a trial was had, resulting in a verdict and judgment for the defendants. An appeal is taken therefrom on the ground of error in the giving and refusal of instructions.

1. The petition described the agreement between the parties in these words:

"A verbal contract of lease whereby plaintiff did for the following crop season rent to defendants jointly [the land referred to] in consideration of which the defendants did agree to farm said land and plant the same to wheat, furnish the seed therefor, harvest and thresh said wheat when matured, and deliver one-third of the crop therefrom to order of plaintiff at the nearest railway station."

The plaintiff, by the use of the terms "lease" and "rent," characterizes the contract as one creating the relation of landlord and tenant, and it is so treated in his brief. The argument upon which he bases his right to recover is substantially this: The statute declares that where the rent is payable in a share of the crop the lessor shall be deemed the owner of such share (Gen. Stat. 1915, § 5980); it is held that the landlord has such an ownership in the growing crop that he may maintain an action for the value of his share against a third person who

has negligently destroyed it (*Sayers v. Railway Co.*, 82 Kan. 123, 107 Pac. 641); the landlord and tenant under such a lease are regarded as tenants in common of the crop (24 Cyc. 1471); and inasmuch as the defendants, by pasturing the growing wheat, used to their profit a part of a crop which the plaintiff owned in common with them, they should account to him for the proceeds in proportion to his ownership. Upon this proposition the plaintiff cites the statute giving one cotenant a right of action against another for receiving more than a just proportion of rents and profits (Gen. Stat. 1915, § 5977), which, however, relates to the rights of tenants in common of the land rather than of the crops. Under a lease, as distinguished from a cropper's agreement, the ownership of the crops as between the landlord and tenant is ordinarily regarded as in the latter, although the rent is to be paid in a share thereof. (24 Cyc. 1469; 8 R. C. L. 376, 377; 16 R. C. L. 588.) But we do not think the controversy is to be settled by the consideration of where the title of the growing crop is deemed to be vested, but by determining the fair and reasonable construction of the contract that was entered into. It was not reduced to writing, but its terms are precisely set out in the pleading. The situation is substantially the same as though a written agreement had been made in the very words used by the pleader. The question presented is as to the legal effect of that language. And we think it reasonably clear that the provision, that the defendants were to deliver one-third of the "crop" at the railway station, meant that one-third of the grain was to be delivered, and from the fact that it was specified that the plaintiff was to receive one-third of the grain, without any reference to his obtaining any other profit out of the transaction, the fair inference is that this is all that he expected, or was entitled to. The defendants were entrusted with the management and control of the crop; it was for them and not for the plaintiff to say whether it should be pastured, and if so when and how, and, in the absence of any express reference to the matter in the agreement, we think they were entitled to the incidental profit.

Whether a part of what may be called the by-products is deemed to be included, without express mention, in an agree-

ment that the landlord is to receive a share of the crop as rent, may depend to some extent on the facts of the particular case. In *Moser v. Lower*, 48 Mo. App. 85, the landowner was held to be entitled to a share of the stalks under a contract giving him a proportion of the corn crop, but the other party was said to be a cropper, and the matter was affected by the practical interpretation given to the agreement. In *Black v. Scott*, 104 Mo. App. 37, the same rule was applied where the conditions may not have been the same, but no purpose was shown to extend the doctrine of the earlier case, or to do more than follow the precedent there established. In *Hansen v. Hansen*, 88 Neb. 517, the circumstance that the landlord's share of the corn crop was to be delivered to him at some distance from the land was held to indicate that the stalks were not meant to be included. In *Iddings v. Nagle*, 2 Watts & Serg. (Pa.) 22, it was suggested that an agreement to pay the rent by a delivery of grain in the bushel implied that the grower of the crop was to have the straw. In *Corey v. Struve*, 16 Cal. App. 310, the tops of sugar beets grown on shares were held to belong to the landlord, largely by reason of a local custom. The present case is not closely analogous to any of those cited, because the portion of the vegetation eaten by the grazing cattle was not part of the matured crop—it did not help to make up the finished product of the farming operation. The use made of the wheat field, resulting in no injury to the crop or the land, was an incidental advantage accruing from its temporary possession and control.

The petition alleges that by the *implied* terms of the contract the plaintiff was entitled to a share in the proceeds of the pasturage, but that is a mere conclusion of law and does not change the force of the allegations as to the facts concerning the contract which was actually made. It is suggested that the pasturage of the wheat amounted to the removal of the crops, giving a right of attachment. (Gen. Stat. 1915, § 5982.) This position is untenable, for it is not claimed that any injury to the crop resulted.

The conclusion announced is reached on the theory that the contract amounted to a lease, but no intimation is intended that a different result would have followed had it been interpreted as a cropper's agreement.

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2. The legal question involved in the appeal from the judgment for the defendants on the second cause of action is substantially the same as that already considered. The trial court refused to give an instruction to the effect that the contract contemplated that the land should not be pastured by either party, and instructed the jury that, in the absence of an agreement to the contrary, the defendants had a right to pasture the growing wheat, being responsible to the plaintiff, however, for any damage to the land resulting therefrom. This is in accordance with what we have already decided, and as the verdict implied a finding that no injury resulted, the plaintiff could not have been prejudiced by the instruction in any event.

The judgment is affirmed.

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No. 21,344.

L. M. NORRIS, *Appellant*, v. EMMA EVANS et al., *Appellees*.

SYLLABUS BY THE COURT.

**FORECLOSURE SALE—Confirmation Set Aside—Redemption Allowed.** In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, *held*, on the facts stated in the opinion, it was error to deny the relief prayed for.

Appeal from Barber district court; GEORGE L. HAY, judge. Opinion filed March 9, 1918. Reversed.

G. M. Martin, of Medicine Lodge, Sam K. Sullivan, and Hal S. Burke, both of Newkirk, Okla., for the appellant.

Samuel Griffin, J. N. Tincher, both of Medicine Lodge, and A. L. Noble, of Winfield, for the appellees.

The opinion of the court was delivered by

PORTER, J.: The suit was one in the nature of a bill to redeem and to set aside the confirmation of a sale in a foreclosure proceeding. The plaintiff appeals from a judgment denying him relief.

L. M. Norris, the plaintiff, resided in Illinois. He was the holder of a mortgage on a farm in Barber county, subject to a

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prior mortgage to the Warren Mortgage Company. In May, 1916, an action in foreclosure, brought by the Warren Mortgage Company, was pending in the district court. Norris filed a cross petition setting up his second lien. Seward I. Field was the local attorney for the Warren Mortgage Company, and had traded for the equity in the land, subject to both mortgages. His deed was recorded on the 4th day of March, 1916. On May 1, he wrote to Carl F. Truitt, who resided in Oklahoma, and who was the attorney for L. M. Norris, the following letter:

"I have just learned that you represent the cross-petitioner and second lien holder in the case of The Warren Mortgage Company against Emma Evans, pending in our court, No. 4997. In this connection I represent The Warren Mortgage Company, holders of the first mortgage, and am writing you to state that court will convene here, regularly, on the 15th day of May, at 2 o'clock in the afternoon, and we can probably arrange to take a judgment at that time. Our court is supposed to convene here on the 8th day of May, but I understand the judge is not going to get down here until the 15th, in the afternoon. It might be that if you could send me figures, I could arrange to take judgment on behalf of both parties as per journal entry and we could agree upon the journal entry without any necessity of your making a trip here. Of course it will be all right for you to come on and we can take the judgment here that day any way, unless you care to submit figures and I will take judgment for both parties if you desire."

On May 10, Mr. Truitt replied as follows:

"We have your letter of a few days ago in which you so kindly offer to represent us at the next term of district court in your county, which convenes in about a week, in the foreclosure suit now pending therein and in which we represent the cross-petitioner. We enclose herewith a brief suggestion of some parts of the journal entry of judgment that we would like incorporated in the journal entry as approved by the court and as filed in this cause. The enclosed is meant only as a suggestion of about what we would like in part, we have also made a brief reference to some parts of the judgment in favor of your client, the plaintiff, only because we could better explain what we were getting at in our part of the journal entry, and is not intended as any suggestion of what your part of the journal entry should or should not be—you are very capable of doing that part yourself. If order of sale issues after six months, as in this state, then you will of course make this journal entry show such time, the main thing we want is a personal judgment against L. Dora Randall, Lucinda Randall and Emma Evans, in addition, of course, of the judgment foreclosing this mortgage. If you have time before court convenes to send us a copy of the journal entry as compiled by you including our part and as ready for the approval of the court, we will be

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glad to look over same and will return same at once if you so desire. We ask this since we are anxious to get proper judgment and at same time do not feel that it is necessary for us to come up there since you have been good enough to volunteer your services in this matter. Any expenses in drawing this journal entry, stenographer fees, etc., we shall expect to reimburse you for our part."

In answer to Mr. Truitt's letter, Mr. Field wrote, May 12, as follows:

"I have your letter of May 10th in reference to case of The Warren Mortgage Company vs. Emma Evans and others. In this connection I did not mean to imply by my letter that I wanted to represent the cross-petitioner, only that I thought I could save Mr. Truitt a trip over here, as in foreclosure matters, we usually find that there is nothing to do except to agree upon a journal entry, and I thought perhaps it would be an unnecessary trip for him and we could handle it through the mails, as I should be glad to do as a matter of courtesy. In this connection, however, while I represent the plaintiff, locally, it also happens that I am the owner of the land against which this mortgage is being foreclosed. I explained this matter to the general attorney for the Warren people and thought it due you to advise you to the same effect, although my deed is on record. I am forwarding your suggestion as to the journal entry to Mr. M. M. Suddock, of Emporia, the general attorney for the plaintiff, and am suggesting to him that he prepare the journal entry or I will do so if he wishes me to.

"Again, you have our old Kansas foreclosure law in Oklahoma, which provides a stay of execution for six months and then sale, with immediate delivery of deed on confirmation. We have a redemption law here under which we sell the property immediately after judgment or as soon as it can be advertised. Upon confirmation of this sale a certificate of purchase is given to the purchaser and the owner of the property allowed eighteen months from the date of the sale to redeem from the sale at the amount sold for, with interest; upon failure to make such redemption during the eighteen months, a deed then issues to the purchaser and during which eighteen months the owner of the property is entitled to possession. Junior creditors, such as second mortgage holders, like yourself, also have redemption rights and may redeem from the certificate holder and thereby add their junior claims to the amount of the certificate, and the owner redeeming thereafter must pay the amount of the certificate and the amount of the junior creditor's claim, such as yourself, who has redeemed from the certificate. These are mere matters of practice, however, and we always take care of them in the journal entry and it works out very simply. This, of course, would change some of your suggestions in the journal entry but the statute will be followed in these matters.

"As above stated, I am forwarding your suggestions and copy of this



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letter to Mr. Suddock to draw the journal entry, or he may refer it back to me and I will draw it."

On May 16, Mr. Truitt received another letter from Mr. Field, as follows:

"In the case of Warren Mortgage Company vs. Evans, judgment was rendered this morning as follows: 'Service by publication approved and judgment for plaintiff in the sum of \$3224.50. Foreclosure of mortgage and awarded first lien. Judgment for cross-petitioner, L. M. Norris, for \$3828.80, foreclosure of mortgage and awarded second lien. Original papers filed for cancellation. Period of redemption fixed at eighteen months.' I am busy trying jury cases but so soon as I get a few moments time, I will prepare journal entry and forward to you for approval together with office copy for your files. I believe this is exactly in accordance with your figures and idea of the case, except that I have omitted the item of \$200.00 attorney fee. I took this matter up with the court and I think there is no question as to the correctness of my position under the Kansas law. If you care to present this matter you may come up and we will take it up, or present it to the court through the mail if you prefer, but I believe the journal entry will stand as the order is rendered. I trust this is satisfactory."

On May 22, Mr. Field wrote again, as follows:

"In the case of The Warren Mortgage Company vs. Evans, et al., I enclose herewith for examination a journal entry of judgment I have prepared in accordance with the judgment rendered on the 16th. In preparing this journal entry I have made it read to render a personal judgment in favor of your client, L. M. Norris, and against the defendants, Randall, as suggested by you, so that it will be good for what it is worth as a personal judgment. Will you kindly examine same, and if it meets with your approval, sign and return to me at once, and I will get it signed by the judge and filed before court adjourns and the judge goes home, which will be some time this week. This provides for an 18 months period of redemption to the defendants and junior lien holders, such as your client, from the date of the foreclosure sale."

Mr. Truitt made no reply to any of the letters except the first one. He testified that on receipt of the letter of May 22 he talked with Mr. Field over the telephone, and that on June 7 he wrote Judge Hay; that Judge Hay answered, stating that in his opinion the showing was not sufficient to justify shortening the period of redemption; that he tried several times during the month of June to reach Mr. Field by telephone, but was unable to get in communication with him; that on the 28th of June he wrote Mr. Field, inquiring at what time the real estate would be sold and if the same had been advertised for sale, but received no reply; that in the first days of July he tried to com-

municate with him over the telephone, but received word that Mr. Field was out of town. Shortly thereafter he telephoned the clerk and was told that the land had been sold, the sale confirmed on the 3d day of July, and that redemption had been made.

It appears that on the 27th of May Mr. Field, as attorney for the Warren Mortgage Company, caused an order of sale to be issued and the sale advertised for July 1. At this time the journal entry had not been settled or agreed upon. The land was sold and bid in by Mr. Field for the Warren Mortgage Company for the amount of its judgment. Mr. Field was the only bidder at the sale. On the same day he filed a motion for confirmation. On July 3 there was a special session of the court, at which the sale was confirmed, and at the same time Mr. Field presented the journal entry to the judge, and it was approved. The amount of the Warren Mortgage Company judgment was \$3,224.50. The amount of the Norris judgment, which was a second lien, was \$3,828.80. Immediately after the sale was confirmed Mr. Field paid the amount of the Warren Mortgage Company's judgment and redeemed the land as owner.

Mr. Field was a witness and produced a letter written by him on May 23, 1916, to Judge Hay, as follows:

"In the case of the Warren Mortgage Company vs. Evans, you will perhaps recall that on the 16th I took judgment by default for the plaintiff for something over \$3,200.00 and for cross-petitioner on second mortgage on behalf of Mr. Carl F. Truitt for something over \$3,800.00. I sent journal entry to Mr. Truitt for approval, and he calls me up to say that he wants the period of redemption reduced to less than 18 months. After talking with him over the long distance telephone, I suggested that he send the J. E. direct to you and if you saw fit to reduce the period of redemption on his showing it would be all right with me; so I am writing to give my side of it, as he will probably explain his position. I do not wish the period of redemption reduced, as I am the owner of the equity, personally. Perhaps that ought not to have any weight, but the facts are that neither of the mortgages on the land is a purchase money mortgage—both represent loans; and also, the land is rented, mostly farmed, balance in pasture, also rented, all enclosed by fence, and in the actual possession of my tenant. Taxes are in default, but property is worth much more than mortgages and taxes. I have just recently acquired it, during the pendency of the case, and wish to merge all indebtedness against it into one certificate of purchase so I can handle it to better advantage."

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He further testified that he did not write Mr. Truitt at any time to tell him that the notice was running and that the property would be sold, his excuse being that he had written Mr. Truitt four letters to which he had received no answer. He was asked,

"Q. You did n't notify Mr. Truitt it was bought and there was going to be a session of court here on the 30th? A. No, sir.

"Q. When did you first know there was going to be one here on the 30th? A. The county attorney and I and some other attorneys, I am not sure who, there were several talking. There was somebody in jail and wanted to plead guilty and get away to the penitentiary and serve his time. It was discussed calling the judge down and I think somebody wanted to plead guilty and get away and I think that was the occasion of a special session.

"Q. You were interested in the judge coming down so as to get a confirmation on the 30th? A. Yes, sir.

"Q. You got it done, did you not? A. Yes, sir.

"Q. And then you immediately redeemed it? A. Yes, sir, I did.

"Q. You did n't mean to tell the court it was not your intention in writing this letter that Mr. Norris would have 18 months to redeem as well as you would have— A. Understand this. When this gentleman wrote me back and disclosed to me that he did not know anything about the Kansas foreclosure laws I undertook, in a two page letter to explain it to him and I think I explained it to him fairly and told him what his rights were and what the redemption period would be and that was before judgment was rendered and his client would have his right. This letter is in evidence here.

"Q. You were sufficiently interested to have a special day by request and have some other reason why the court should be here? A. I did not order that day.

"Q. You knew if the court did not come until October you could not get a confirmation of that sale until he did come? A. I think I could have got a confirmation on the 9th of October because everything was regular and clean and clear and I still think if the court had not got down here all summer (and he usually comes two or three times) on the 9th day of October he would have confirmed that sale."

He further testified that he was the only bidder at the sale and bid for his client, The Warren Mortgage Company. He denied receiving a letter of June 28 asking about the time of sale, and denied that in the telephone conversation there was anything said about postponing the proceedings in order to present the matter of the period of redemption to Judge Hay.

His testimony is that in the conversation over the telephone Mr. Truitt said he had received the journal entry, and that it was all right, except that he did not like the eighteen months' period of redemption that was allowed; that he then informed Mr. Truitt under what circumstances the judge would reduce the period, and that he did not think Mr. Truitt was entitled to have it fixed at six months, but told him if he was not satisfied with the eighteen months to send the journal entry to Judge Hay and present his side of the case, "and I will write him a letter and tell him my side, and if Judge Hay sees fit to reduce the period of redemption it will be all right with me."

The land in controversy is shown by the testimony to be worth from \$6,400 to \$8,000. Under the judgment of the district court the plaintiff loses his lien, and Mr. Field obtains the land for the amount of the first lien.

The plaintiff in the present suit was represented in the foreclosure proceedings by an attorney who resided in Oklahoma and who seems to have been unfamiliar with the Kansas laws respecting foreclosures and the rights of junior lien holders. Even after discovering his ignorance of the Kansas statutes, the attorney was negligent in failing to make himself familiar with the law affecting his client's interest. Apparently he relied upon the fairness and courtesy of the defendant's attorney to protect his client's rights. Irrespective of Mr. Field's motive, it is obvious, we think, that the natural effect of his letter offering to act for Mr. Truitt, together with the apparent candor and frankness of all the other correspondence, had the effect of lulling the attorney into the belief that no advantage would be taken of his ignorance of the Kansas law, nor of his failure personally to give attention to the date of the sale. Originally Mr. Field owed no duty to the plaintiff or his attorney; in fact, he represented opposing interests, those of his own client and of himself as owner of the land; but it would be going too far to say that after encouraging the nonattendance of the opposing attorney at court, by voluntarily offering to act for him in taking the judgment and to prepare a journal entry to be agreed upon, he was in a position where in conscience and equity he could take advantage of the absence of plaintiff's attorney, and especially of that

attorney's ignorance of the fact that a sale of the property was pending, and that a special session of court had been arranged at which confirmation could be had. True, in the second letter he disclaims any intention of acting as the attorney for Mr. Truitt's client, but this frank statement of itself might have tended only to increase the attorney's confidence.

Although the petition alleged actual fraud and an attempt to procure an unconscionable advantage of the plaintiff by a studied attempt to deceive his attorney, it was not necessary that this claim should be established in order to entitle the plaintiff to the relief demanded; and the judgment of the trial court is that fraud had not been proved. Since the procedure in confirmation of sales was amended in 1893 (Laws 1893, ch. 109, § 26; see Civ. Code, § 500), the trial court is not expected to close its ears to all equitable considerations and confirm a sale as a matter of course, merely because the record shows no irregularity in the movement of the judicial machinery by which the sale was accomplished. Even before the statute was amended, it was held that, "Inadequacy of price, taken alone, is seldom if ever sufficient to authorize the setting aside of a sheriff's sale; yet great inadequacy of price is a circumstance which courts will always regard with suspicion, and in such case, slight additional circumstances only are required to authorize the setting aside of the sale." (*Means v. Rosevear*, 42 Kan. 377, 383, 22 Pac. 319.) To the same effect is *Dewey v. Linscott*, 20 Kan. 684.

In *Bank v. Murray*, 84 Kan. 524, 530, 114 Pac. 847, and in other recent cases, the amendment has been referred to as imposing upon the court the same powers and responsibilities that rested upon the chancellor of the old court of equity in a suit in the nature of a bill to redeem. In the case last cited the court approved the following language from *Graffam v. Burgess*, 117 U. S. 180:

"Looking at the whole case, the traces of design on the part of Graffam to mislead the complainant, to lull her into security, and thus to prevent her from redeeming the property, are abundantly manifest, and such design must be assumed as an established fact. . . . As already perceived, we do not rest our conclusion alone upon the gross inadequacy of the consideration of the sale; but upon that, in connection with the unfair conduct of the defendant in taking advantage of the complainant's

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ignorance of the sale, and giving her no intelligible notice or intimation of it, or of his intended seizure of the property after the year of redemption had passed, but standing by and seeing her expend large sums of money upon it, even after the year had expired. This, we think, presents a case sufficiently strong to justify the action of the court below, at least to the extent to which it went in making the decree appealed from [allowing the owner to redeem].’ (p. 190.)”

The opinion also quoted with approval from *Pewabic Milling Company v. Mason*, 145 U. S. 349, where, after stating the rule that there is a measure of discretion in a court of equity in such matters, Mr. Justice Brewer said:

“And after a sale has once been made, he will, certainly before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted.” (p. 356.)

In *Bank v. Murray*, supra, we held, also, that, inasmuch as the entire evidence on which the trial court acted had been abstracted, “we may properly reach our own conclusions thereon.” (p. 531.)

As the judgment stands, the plaintiff, who was himself without fault, and who offers to do equity by bidding the amount of the first and second liens or by redeeming from the first, is compelled to lose his entire lien, while one who purchased the property subject to both liens gets a clear title merely by satisfying the first, and is thus permitted to take advantage of the absence and neglect of plaintiff’s attorney to attend and bid at the sale under such circumstances as, in our opinion, renders the judgment unconscionable and inequitable.

The judgment is reversed and the cause remanded, with directions to set aside the confirmation and permit plaintiff to redeem.

BURCH, J., concurs in the result.

No. 21,347.

GRACE ALLEN, *Appellee*, v. THE PEOPLES STATE BANK, *Appellant*, et al.

## SYLLABUS BY THE COURT.

1. **AGENCY**—*Bank Loaning Plaintiff's Money*. The record justified the conclusion that the defendant bank acted as the agent of the plaintiff in loaning the money sued for herein.
2. **SAME**—*Fraudulent Conduct—Taking Worthless Security*. The petition set forth conduct clearly fraudulent without using that particular adjective. *Held*, that it was proper to instruct on the fraud thus alleged.
3. **SAME**—*Bank Profited by Transaction*. The evidence tended to show that the bank profited by the transaction.
4. **TRIAL**—*Evidence*. No error appears touching the admission or rejection of evidence.

Appeal from Seward district court; GEORGE J. DOWNER, judge. Opinion filed March 9, 1918. Affirmed.

G. W. Sawyer, of Liberal, for the appellant.

F. S. Macy, of Liberal, William Barrett, and L. G. Turner, both of Pratt, for the appellee.

The opinion of the court was delivered by

WEST, J.: The defendant bank appeals from a judgment against it for having loaned for the plaintiff \$400 to an insolvent borrower.

Complaint is made of rulings rejecting and receiving evidence, of instructions given, and of overruling a motion for a new trial.

The petition alleged in substance that the bank, well knowing the insolvency of one Franz C. Wimmer, loaned \$400 of the plaintiff's money to him, taking a mortgage on a stock of drugs subject to a first mortgage to the bank for \$525.25; that plaintiff had advised the bank that she desired to have this loaned with good security; that the bank well knew the insolvency of Wimmer and misappropriated the plaintiff's money by loaning it to him, and used the proceeds to liquidate overdrafts and other accounts owing the bank by Wimmer, who was subsequently adjudged a bankrupt, all of the assets being exhausted by the bank and the plaintiff receiving nothing.

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It is complained that no agency was shown, but the record sufficiently justifies the conclusion of the jury on this point.

The court correctly instructed on the subject of fraud, and of this the defendant complains on the ground that no fraud was alleged. The word fraud is not found in the petition, but that pleading as clearly and fully described fraudulent conduct as if that particular adjective had been employed. Hence, there was no error in giving the instructions complained of.

It is argued that the bank could be held only for the unauthorized acts of its officer in case it accepted and retained the benefits arising therefrom, and the question is asked, What consideration did the bank receive or retain? There was evidence that the bank used the proceeds of this loan to pay off overdrafts and other accounts held by it against Wimmer.

We find no error in the rejection or admission of evidence. The jury heard all the testimony, and the trial court approved their verdict. We now add the approval of this court.

The judgment is affirmed.

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No. 21,350.

HARRIET M. BERRY, as Administratrix, etc., Appellee, v.  
CHAUNCEY DEWEY et al., Appellants.

SYLLABUS BY THE COURT.

1. JURISDICTION—*Calling in Judge of Another District.* *Berry v. Dewey*, 102 Kan. 392, is followed on the question of the jurisdiction of the trial judge.
2. CONTINUANCE—*Insufficient Grounds.* The defendants applied for a continuance on the ground that one of their attorneys was a member of the legislature and could not be present at the trial because the legislature was in session. The application was properly denied.
3. CONTINUANCE—*Insufficient Showing.* It is not error to deny an application for a continuance made on the ground that the person making the application is a party to the action and desires to attend the trial as a witness and is prevented from so doing by the sickness of a member of his family, where that sickness is shown by the unverified certificate of attending physicians, and no one having knowledge of the sickness swears to either the certificate or the application.
4. WRONGFUL DEATH—*Damages—Competent Evidence.* In an action to recover damages for wrongful death, it is proper to prove the



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amount of property owned by, and the wage-earning capacity of, the deceased person.

5. *SAME—Trial—Competent Evidence Withdrawn—No error.* A judgment will not be reversed on account of the withdrawal of evidence tending to impeach persons who are neither parties to the action nor witnesses therein, where the evidence withdrawn is on matters wholly collateral and cannot assist the jury in determining the issues on trial.
6. *CONSPIRACY—Evidence.* There was evidence sufficient to show a conspiracy on the part of the defendants.
7. *SAME—Instructions.* The instructions concerning conspiracy were fair, and they fully protected the rights of the defendant.
8. *SAME.* Of the instructions requested by the defendant, those that were proper were, in substance, given by the court, and those that were refused were properly refused.
9. *WRONGFUL DEATH—Damages—Verdict Not Excessive.* In an action brought by a mother to recover damages for the wrongful death of her son, a verdict and judgment for \$5,000 is not excessive, where the deceased was 33 years old at the time of his death, was in good health and vigorous, was accumulating property, and was able to earn about \$1,000 a year.
10. *SAME—Certain Deductions from Damages Properly Denied.* Financial benefits derived by the heir of a person who has lost his life by the wrongful act of another cannot be deducted from the damages sustained and the verdict and judgment be reduced by the benefits received.

Appeal from Sherman district court; JACOB C. RUPPENTHAL, judge *pro tem*. Opinion filed March 9, 1918. Affirmed.

*William R. Smith*, of Topeka, *James H. Harkless*, and *Clifford Histed*, both of Kansas City, Mo., for the appellants.

*A. M. Harvey*, of Topeka, and *L. W. Colby*, of Beatrice, Neb., for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: In June, 1903, the defendants, with other persons, ten in all, armed, left the ranch of defendant Chauncey Dewey and went to the home of Alpheus Berry, about five miles distant, to get a water tank that had been purchased by Chauncey Dewey at an execution sale on the day previous. While Dewey and his party were at the home of Alpheus Berry, a battle occurred between Dewey and his party on the one side and Daniel Berry, Alpheus Berry, Burch Berry, Beach

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Berry, and Roy Berry on the other side. When the battle ended, Daniel Berry, Alpheus Berry, and Burch Berry had been killed by members of the Dewey party, and Roy Berry had been wounded by them. Beach Berry escaped. None of the Dewey party was injured.

Daniel Berry was the father of Burch Berry and Alpheus Berry. Harriet M. Berry was the wife of Daniel Berry and the mother of Burch Berry and Alpheus Berry. In 1905 Harriet M. Berry was appointed administratrix of the estate of Burch Berry. She then commenced this action, which, in March, 1917, resulted in a judgment in favor of the plaintiff for \$5,000, from which judgment the defendants appeal.

1. The defendants question the jurisdiction of Hon. J. C. Ruppenthal to try the action. They present the same questions that were presented in *Berry v. Dewey et al.*, 102 Kan. 392. The conclusion there reached is now followed.

2. The defendants applied for a continuance on the ground that B. F. Endres, one of their attorneys, was a member of the legislature and could not be present at the trial because the legislature was in session. The continuance was refused. The defendants contend that the refusal was error. The trial court gave as a reason for refusing to grant a continuance on this ground that Mr. Endres did not appear to be of counsel for the defendants in kindred actions that had been on trial in the previous November and December, and that the court had every reason to believe that the employment of Endres in the present action was subsequent to his election to the legislature. The court concluded that to grant a continuance on an application of this kind would be ignoring the provisions of sections 6050-6052 of the General Statutes of 1915, which authorize the court to prevent any abuse of the privileges granted by these sections of the statutes. This action had been pending in the district court twelve years; it was time to dispose of it. A continuance might have been granted, but there was no reversible error in refusing to grant it.

3. The defendants complain of the refusal of the court to grant a continuance on account of the absence of defendant Chauncey Dewey, who desired to be present and to testify as a witness. At the time of the trial Mr. Dewey was in New Orleans, La. On March 1, 1917, he telegraphed from New Orleans

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that his only child was dangerously sick, and that he could not leave the child, and asked that the cause be continued. That telegram was sent to Clifford Histed, one of Dewey's attorneys. The certificate of three doctors in New Orleans was attached to, and made a part of, the application for a continuance. That certificate was dated March 1, 1917, and read :

"To whom it may concern: This certifies that, owing to the critical condition of their child, Molly Dewey, Mr. Chauncey Dewey and wife will be unable to leave the city at present or in the near future."

The certificate was signed by three physicians and acknowledged—not sworn to—before a notary public. The application was sworn to by James H. Harkless, one of the attorneys for the defendants. It disclosed the importance of Dewey's attendance, both as a witness and as a party. The basis of the application was the sickness of Dewey's child. In *Harlow v. Warren*, 38 Kan. 480, 17 Pac. 159, this court said :

"Where an application is made for the continuance of the trial of a case to another term, upon the ground that the party applying therefor is prevented from attending the court on account of his sickness; and the application is supported, as to the sickness of the party, only by the certificate of a physician; and no affidavit is filed by the physician, or any other person having personal knowledge that the party is unable to attend court: *Held*, That the ruling of the district court in refusing a continuance of the case will not be reversed." (Syl.)

(See, also, *Beard v. Mackey*, 51 Kan. 131, 32 Pac. 931; 9 Cyc. 97.)

The present case and *Harlow v. Warren*, supra, are very closely parallel, and under the authority of that case the trial court did not abuse its discretion in refusing a continuance, and no reversible error was thereby committed.

4. The defendants contend that the court erred in admitting evidence concerning the property owned by, and the wage-earning capacity of, Burchard B. Berry. In an action to recover damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person. (*K. P. Rly. Co. v. Cutter*, 19 Kan. 83; *Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635.)

5. On the trial, the plaintiff, in order to show the good character of the Berrys, was permitted to prove that none of the Berrys had been engaged in stealing cattle prior to the shooting. The defendant then offered to introduce in evidence an

indictment of Alpheus Berry and Daniel Berry, charging them with grand larceny and with having received stolen property in Boulder county, Colorado, in October, 1891. The indictment, with other documents concerning the same matter, was admitted in evidence, and afterward withdrawn. The defendants urge that it was error to withdraw that evidence from the consideration of the jury. The evidence may have been competent, but it was not material. It did not matter whether Alpheus Berry and Daniel Berry had previously been engaged in stealing cattle, or whether they had been indicted for larceny. Evidence on either of these questions could not assist the jury in determining the issues that were properly on trial in the present action. Neither Alpheus Berry nor Daniel Berry were witnesses; both had been killed by the Dewey party.

6. The defendants strenuously argue that there was not sufficient evidence to establish a conspiracy on their part. Although it is practically impossible to detail all the evidence which tended to prove that there was a conspiracy, yet some of the evidence which tended to show that fact was as follows:

For some time there had been ill feeling between Dewey and his employees on the one side and the Berrys on the other side. Threats had been made, and each of the contending parties went armed as against the other. On the day before the tragedy occurred, defendant Dewey, at a sheriff's sale under an execution, purchased a water tank that was then on the property of Alpheus Berry. On the day of the tragedy, ten men gathered at the ranch headquarters of defendant Dewey. The ten, all armed, then went to the home of Alpheus Berry to get the water tank, but, when they reached that home, no request or notice of any kind was given that the defendants desired to take the tank. They arranged themselves in such a way as to protect themselves in case shooting should occur. When the Berrys approached, the Dewey party began shooting, and when the shooting ceased three of the Berrys were dead and one was wounded; one had escaped. The tank was then forgotten, and the Deweys returned to their ranch. This evidence was sufficient to warrant the trial court in submitting to the jury the question of a conspiracy, and was sufficient to justify the jury in finding that there was a conspiracy.

7. Complaint is made of the instructions given by the court. The basis of this complaint is the question of conspiracy. The instructions have been examined; they appear to have been fair and to have fully protected all the rights of the defendant. No substantial error in them has been indicated by the defendants.

8. Complaint is made of the refusal of the court to give certain instructions asked by the defendant. Those of the instructions requested that were proper were, in substance, given by the court, and those that were not proper were refused. There was no error in refusing to give any of the instructions requested by the defendant.

9. Another matter urged is that the verdict was excessive. The verdict and judgment were for \$5,000. At the time Burch Berry lost his life he was 33 years of age, in good health, vigorous, and was accumulating property, and was able to earn about \$1,000 a year. Burch Berry left neither wife nor children. The verdict for \$5,000 was not an excessive verdict as compensation for the loss of support that would have been furnished to Harriet M. Berry by her son, had he lived after her husband and her other son were killed.

10. The last matter urged is that Harriet M. Berry, who was the sole heir of Burch Berry, received a substantial financial benefit as the result of the death of her son, and it is urged that the benefit should have been deducted from the amount of the verdict, and, if the benefit was greater than the damage sustained, no verdict should have been rendered for the plaintiff. The proposition is untenable. Although it appears to have standing in the courts of some of the states, it does not address itself to the judgment of this court as being sound, legal, equitable, or fair, and it cannot be permitted to reduce the amount of recovery in any way.

On the whole, substantial justice seems to have been done in this case, and the judgment is affirmed.

No. 21,352.

NATHAN HENSHAW, *Appellant*, v. ALBERT J. SMITH et al.,  
*Appellees*.

## SYLLABUS BY THE COURT.

1. **CONTRACTS—Partly Valid—Partly Invalid—Enforcement.** If a contract contains provisions some of which are valid and some of which are invalid, and the lawful matter can be readily severed from that which is unlawful, the lawful portion of the contract will be upheld. (*Fackler v. Ford*, McMahon 21, 1 Kan. [Dass. ed.] 463, syl. ¶ 2.)
2. **LANDLORD AND TENANT—Valuable Improvements by Tenant—Reimbursement—When Due.** Where a tenant makes lasting and valuable improvements on a farm which the landlord agrees to pay for when the tenancy is terminated, the tenant's right to reimbursement for the improvements is sufficiently mature to justify his cause of action when the landlord leases the farm to another tenant and the latter is let into possession of part of the property.
3. **SAME—Limitation of Actions.** The statute of limitations does not begin to run until an obligation is due.
4. **SAME—Limitation of Actions—Statute of Frauds.** Where the time fixed for payment of an oral obligation is uncertain, but its maturity might have arrived within one year, and the promisee had fully performed his part of the obligation, the statute of limitations did not begin to run until the obligation matured, and the obligation was not repugnant to the statute of frauds.
5. **SAME—Measure of Recovery.** Where parties, by agreement, fix the measure of recovery due from the one to the other, their agreement governs, and abstract principles of law relating to the measure of recovery when agreements are wanting are inapplicable.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed March 9, 1918. Affirmed.

*J. B. Wilson*, and *B. V. Pardee*, both of Lawrence, for the appellant.

*John J. Riling*, and *Edward T. Riling*, both of Lawrence, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: This was an action by a landlord against his tenant on certain rent notes, and for the proceeds of the landlord's share of a wheat crop, and a cross action by the tenant

for permanent improvements placed on the land pursuant to certain oral agreements made from time to time between the landlord and the tenant.

The plaintiff rented his farm in Douglas county to the defendant, A. J. Smith. The other defendants are the wife and a son of the tenant. The tenancy began in March, 1897, and continued for about twenty years. It had not been completely terminated at the inception of this lawsuit, although the farm ere then had been leased to another tenant, and the latter was in possession of part of the land.

The defendant, A. J. Smith, admitted his liability on the rent notes, and admitted his liability for the plaintiff's share of the proceeds of the wheat crop, but disputed its amount. There was also a minor item or two touching the rent of a small acreage of pasture, which was to be computed on its value as wheat land.

For several years there was apparently no written lease between the parties. Later, about 1906, annual written leases between the parties began to be their practice, but, according to defendant's pleading and testimony, these leases were only to evidence the rent charges, and not for the purpose of defining the leasehold as an ordinary tenancy from year to year. Defendant's cross petition alleged that, in addition to the written contracts of lease, there was a series of oral agreements whereby defendant was to occupy the farm as long as plaintiff owned it and whereby defendant was privileged to place permanent improvements upon the land, upon condition that if plaintiff should sell the land, or if defendant was otherwise dispossessed, the plaintiff was to reimburse defendant for his labor and expenses incurred in making these improvements. Pursuant to these oral understandings agreed to from time to time, defendant planted an orchard on the land in 1900, and at various later intervals he built an addition of three rooms and a porch to the farmhouse, put a cement foundation under the house, painted the house, made several additions to the barn, seeded several acres to grass, grubbed out stumps, cut large hedges, built fences, and otherwise permanently improved the property. Aside from defendant's own labor and that of his sons for the improvement of the farm, he exhibited receipts for payments for materials and labor made by him, aggregating several hundred dollars.

The aggregate of plaintiff's causes of action was for \$731.68 and interest; defendant's cross action was for \$903.56. The jury returned a verdict for defendant for \$99.57.

Plaintiff assigns several errors, which will be noted in the order presented.

It is hardly accurate for plaintiff to say that the verbal agreements contradicted the terms of the written instruments. The instruments—the leases made from year to year—did not profess to cover the subject of the improvements. There is no reason to think the matter of improvements was involved in the annual written contracts of lease. It does not appear that the oral agreements concerning reimbursements for improvements were part of the leases nor merged therein. The times when the oral agreements were made had no relation to the times when the annual leases were executed. If the oral agreements to pay for the improvements had been made between the landowner and some third person not residing on the land, no one would have the hardihood to maintain that the landlord would not be bound to pay for them. Nor would there be any justice in holding that because the party making the improvements was a tenant of the landlord he should not be paid for making them. This view of the controversy does not require the court to go the full length contended for by defendant—that the annual leases were merely to specify the rent in writing—nor is it necessary to give force to the tenant's contention, that he was entitled to hold the property until it should be sold by the landlord. The matter is clearly severable. The agreement, if there was one—or the illegal agreement as it really appears to have been—that the defendant could retain the farm as long as the landlord owned it, is readily severable from the various agreements between the defendant A. J. Smith and the plaintiff touching the improvements. Thus, when the building of an addition to the house was under consideration, plaintiff said:

"It is for thee, Albert; I will never make thee move. If thee has to move, I will pay thee for it."

And, when the building or enlarging of the barn was under consideration, plaintiff said:

"All of these improvements is for thee, and if thee ever has to move, I will pay thee for all of them."



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The promise, "I will never make thee move," may be wholly void, as being at variance with the annual written leases, or because it is an abortive obligation pretending to convey an interest in land of greater dignity than a lease for a year, which could not be done except in writing; and it may also be void as indefinite and without consideration. But the promise, "If thee ever has to move, I will pay thee for it," is a binding severable obligation, not dependent upon the length of the term of tenancy; and it can and should be enforced. (*Fackler v. Ford*, McCahon, 21, 1 Kan. [Dass. ed.] 463, syl. ¶ 2; 9 Cyc. 569; 1 M. A. L. 495, 496.)

In 6 R. C. L. 682 it is said:

"But where the consideration for a contract is made up of several distinct transactions or several parts, some of which are legal while others are illegal, and the legal portions of the consideration can be separated from the illegal portion, the contract will be upheld, at least if it contains nothing contrary to good morals and nothing for which a legal penalty is incurred. A similar rule seems to apply where the illegal portion of the consideration is merely incidental."

It is next urged that, even if the oral agreements to pay for the improvements were not merged into the annual contracts of lease, the defendant's cause of action thereon was not mature. The plaintiff landlord had taken steps to terminate the tenancy. He had leased the farm to another tenant and had already let the new tenant into possession of part of the property. It was not necessary for defendant to wait until he was forced to surrender the whole premises. When defendant pleaded his cross action it was then apparent he would "have to move"; the time for payment had substantially arrived in accordance with plaintiff's promise, "If thee has to move, I will pay thee."

The court discerns no merit in plaintiff's next contention—that if the defendant's claims were mature, they were more than three years old and barred by the statute of limitations. The statute never begins to run until an obligation is due. The term fixed for payment was uncertain, but since it could have wholly matured within a year, and there had been complete performance by the defendant, neither the statute of frauds nor the statute of limitations barred the defendant's cross action. (*Larimer v. Kelley*, 10 Kan. 298, 312; *Stout v. Ennis*, 28 Kan. 706, Note [Dass. ed.], p. 715; *Sutphen v. Sut-*

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phen, 30 Kan. 510, 2 Pac. 100; *A. T. & S. F. Rld. Co. v. English*, 38 Kan. 110, 117, 16 Pac. 82; *Aiken v. Nogle*, 47 Kan. 96, 98, 27 Pac. 825; *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846; Browne on Frauds, 2d ed., § 279; 20 Cyc. 199.) Plaintiff's obligation to pay was not due, not mature, until he leased the farm to another tenant.

Touching the proper measure of recovery, the measure was fixed by the agreement of the parties and did not rest on abstract principles of law which courts apply in the absence of such agreements.

Neither error of law nor miscarriage of justice can be discerned in this case, and the judgment of the trial court is affirmed.

No. 21,063.

W. W. DUBBS and A. L. DUBBS, *Appellees*, v. E. F. HAWORTH, as Executor of the Estate of TACY CAMPBELL, deceased, *Appellant*.

## SYLLABUS BY THE COURT.

1. CONTRACT OF EMPLOYMENT—*Findings Not Inconsistent*. There is neither literal nor positive inconsistency between a jury's finding that services performed for an elderly woman, since deceased, were to be paid for "after she was through with her property," and another finding of the jury that such payment was not to be made by a bequest in her will.
2. SAME—*Proof of Claim against Estate—Sufficient Verification*. Where, pursuant to a single contract, two persons jointly perform services for another person, since deceased, the affidavit of one of the persons performing the services is a sufficient verification or proof of claim to satisfy the statute (Gen. Stat. 1915, §§ 4572, 4573) relating to the presentation of demands against the estate of the deceased.
3. SAME—*Proof of Claim—Objections to Affidavit Too Indefinite—Waiver*. Where an affidavit in support of a proof of claim against an estate is lacking in some of the recitals required by the statute, but the defendant's objection to the affidavit was too obscure to apprise the probate and district courts of the specific nature of the defect, the defect will be deemed waived, and it is too late to raise a specific objection to the verification for the first time on appeal.
4. SAME—*Proof of Claim—Amount Increased by Amendment*. When parties who have jointly performed services for a person, since deceased, present their claim therefor against such person's estate, and are required to itemize their claim, there is no impropriety in their amending their claim to show a list of services performed by them, in

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excess of the amount for which they demand payment, and they may rely for recovery of their limited demand upon the entire list of items which they were required to itemize and specify.

5. *SAME—Claim against Estate—Statute of Limitations.* Where two persons jointly performed services for another person, which services extended over a period of several years and were to be paid for by the recipient "after she was through with her property," a demand against the latter's estate after her death, if timely made, is not affected by the statute of limitations.

Appeal from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed March 9, 1918. Affirmed.

*D. M. McCarthy, J. R. White*, both of Mankato, *I. M. Mahin*, and *F. W. Mahin*, both of Smith Center, for the appellant.

*W. R. Mitchell*, of Mankato, for the appellees.

The opinion of the court was delivered by

DAWSON, J.: W. W. Dubbs and A. L. Dubbs, husband and wife, filed in the probate court a claim against the estate of Tacy Campbell for services rendered by them to the latter in her lifetime, at her instance and request. This claim was only verified by Dubbs, the husband, and it was disallowed by the probate court on the ground—

"That the evidence is insufficient to constitute an oral contract between said claimants and said deceased."

The claimants appealed to the district court, where they prevailed. The jury made special findings of fact:

"Question Number 1: Did Tacy Campbell, deceased, agree with the plaintiffs, to pay them for the services for which they claim pay in this suit? Answer: Yes.

"Q. 2. If you answer question number one in the affirmative state when she made such an agreement? A. Before services were rendered.

"Q. 4. If you answer the question number one in the affirmative, state when she was to pay for such services. A. After she was through with her property.

"Q. 5. If you answer question number one in the affirmative, state whether or not such payment was to be made by a bequest in her will? A. No.

"Q. 8. Did Tacy Campbell at any time agree with Mrs. A. L. Dubbs to pay her for any services rendered by Mrs. Dubbs? A. Yes.

"Q. 11. If you answer question number one and eight in the affirm-

ative, state whether or not the plaintiffs voluntarily quit the service of Tacy Campbell in 1912? A. Yes."

Several errors are urged, which will be considered in the order presented.

It is urged that the special findings are inconsistent, particularly findings 4 and 5. There is no literal inconsistency. The evidence shows that at one time Mrs. Campbell made a will of all her property to the plaintiffs—some \$40,000 in value—and that she later revoked that will. Mrs. Campbell doubtless believed she had a right to do so. She had not literally bound herself to pay the plaintiffs by some bequest or provision in her will. In revoking her will she took advantage of the literal terms of her bargain to pay "after she was through with her property." Thus it cannot be declared that there is a positive inconsistency between findings 4 and 5.

It is next urged that the plaintiffs' proof of claim was insufficiently verified. The claim was for the services of both husband and wife, and it was verified by the husband alone. Another defect urged is that the affidavit did not contain the recital prescribed by the statute, "stating to the best of his [affiant's] knowledge and belief he has given credit to the estate for all payments and offsets to which it [the estate] is entitled, and that the balance claimed is justly due." (Gen. Stat. 1915, § 4572.)

The proof of claim and the affidavit showed clearly that the services were rendered by both husband and wife, not that some of the services were rendered by the husband and some by the wife. Consequently, the affidavit of one of the parties presenting the claim was as potent as if the claim—the same claim—had been sworn to by both husband and wife.

Touching the want of the recitals in the affidavit which the statute requires, it does not appear that this defect was raised in the probate court, nor in the district court. There was, of course, the blind, stereotyped demurrer:

"That said proofs of claim and each of them failed to state matter and facts sufficient to constitute a cause of action or a proof of claim against the aforesaid estate."

And again—

"For the further reason claimants and plaintiffs are without legal capacity to sue on the amended proof of claim not being made and filed

according to law and being irregular, no service having been made upon the executor of above named estate."

The real objection in the probate and district courts to the proof of claim—the want of the statutory recitals in the affidavit—was shrouded and obscured in a cloud of words. The probate court based its judgment on the insufficiency of plaintiffs' evidence; and even the district court did not perceive what the defendant was driving at. What the defendant should have done was to point out the defect clearly, so that plaintiff might have had an opportunity to amend the affidavit. However, in the course of the trial both of the plaintiffs were on the witness stand, and all the facts, including those which the statute requires to be established by affidavit, were developed and proved by sworn testimony. In principle, the sworn evidence used in the trial ought to be held to answer every purpose of a preliminary affidavit filed with the claim. Moreover, it is too late to raise a question of the insufficiency of the verification for the first time on appeal. (*Emery v. Bennett*, 97 Kan. 490, 155 Pac. 1075; *Blair v. McQuary*, 100 Kan. 203, 206, 162 Pac. 1173, 164 Pac. 262.)

The next complaint of appellant relates to the form in which the claim was presented. Plaintiffs' first claim was on a lump sum of \$600. They were required to amend by setting out the specific items upon which their claim was based. Plaintiffs complied by setting out a specific list of services covering a number of years and aggregating \$1087. Plaintiffs were then required to elect on which of the items listed they would rely for a recovery, and they responded by electing to rely on all of them, notwithstanding their total demand was only for \$600. Error is assigned on this, but it does not appear to be seriously objectionable. It is not required of a creditor that he shall demand the uttermost farthing which may be technically due him. He may be satisfied with less than his just due; and if, in fact, he honestly believes that more is due him than he is asking to be paid for, his debtor has no just complaint that the creditor, upon the debtor's request, specifies more items than the aggregate amount for which the creditor is insisting on payment. Modesty of demands is ordinarily a virtue, not a fault.

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Still another point suggested is that the plaintiffs' claim was barred by the statute of limitations. We think not. The services performed by plaintiffs were not to be paid for until after Mrs. Campbell "was through with her property," and it does not appear how the statute affects their right of recovery under their contract, as established by the findings of the jury. (*Aiken v. Nogle*, 47 Kan. 96, 27 Pac. 102; *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846; *Henshaw v. Smith*, ante p. 599.)

The record discloses no prejudicial error, and the judgment is affirmed.

No. 21,361.

G. L. FINN, *Appellee*, v. NANNIE ALEXANDER and JOHN COLLISON, *Appellants*.

## SYLLABUS BY THE COURT.

1. **TITLE—Adverse Possession—Essential Requirements.** Title to the land of another cannot be acquired by adverse possession unless the possession is open, notorious, hostile, and exclusive—a possession of such a nature and notoriety that the owner may be presumed to know that the occupant is claiming a title inconsistent with his own.
2. **SAME—Occupancy in Common—Not Adverse Possession.** Occupancy of land in common with the owner, or with his consent and in recognition of his right, is not sufficient to constitute adverse possession.
3. **SAME—Evidence—Payment of Taxes.** Payment of taxes, although not a controlling circumstance, is one of the means by which ownership is asserted, and the failure to pay taxes weakens a claim of ownership by adverse possession.
4. **SAME—Findings Sustained by Evidence.** The general finding of the court that the defendant had failed to sustain her claim of title by adverse possession is held to be sustained by the evidence.

Appeal from Lane district court; ALBERT S. FOULKS, judge. Opinion filed March 9, 1918. Affirmed.

*Ed R. Bane*, of Scott City, *Robert Stone*, *George T. McDermott*, both of Topeka, and *Dwight M. Smith*, of Kansas City, Mo., for the appellants.

*J. S. Simmons*, and *K. K. Simmons*, both of Hutchinson, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action of ejectment by G. L. Finn against Nannie Alexander and another. It was conceded that the plaintiff, a resident of California, held the record title to the land, having acquired his deed thereto in 1901; but the defendant, Nannie Alexander, claims title by adverse possession for more than fifteen years in herself and her grantor, S. L. Filson. The defendant claims that Filson received a deed to the land about 1890, which he neglected to put on record and later lost; that he immediately went into possession of the land, cultivating and fencing a portion of it and inclosing the balance of it as a part of his pasture land; that he raised crops upon it every year and continued in open possession until he conveyed it to her in 1907; and that during this time no one questioned his right. The evidence on behalf of the plaintiff tended to show that it was the custom of cattlemen to use pasture lands of nonresidents; that Filson used the land in question with Finn's permission, and that acts and statements of Filson were inconsistent with a claim of ownership adverse to plaintiff; and that he was not in continuous possession of the land. The evidence was heard by the court, who rendered judgment in plaintiff's favor, and the defendants appeal.

The question presented for decision on this appeal is whether the general finding of the court in favor of the plaintiff is sustained by sufficient evidence. It is conceded that the plaintiff has the record title. The defendant is compelled to rely on such right as was gained by Filson's possession of the land. The tract was inclosed in the big pasture of Filson, and it is shown that he began pasturing and using the land more than fifteen years before this suit was commenced; but, a party cannot gain title to the land of another by possession unless it is really adverse. The plaintiff claimed and offered testimony tending to show that the occupancy of the land by Filson was permissive in character, and that it was held in subordination to plaintiff's title and ownership. The testimony in behalf of defendant, if it had been uncontradicted, would have supported her claim of adverse possession, but opposing testimony of the plaintiff tended to show that Filson's possession of the land lacked the essential elements of adverse possession. Occu-

pancy in common with the owner or with his consent and in recognition of his right is not sufficient to constitute adverse possession. To gain title to the land of another the possession must be open, notorious, exclusive, and hostile—a possession of such a nature and notoriety that the owner may be presumed to know that the occupant is claiming a title inconsistent with his own. (*Gildehaus v. Whiting*, 39 Kan. 706, 18 Pac. 916; *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056; 1 R. C. L. 700.)

A possession, however open and long continued it may be, will not operate as a disseizin and commencement of a new title unless it imports a denial of the owner's title and an appropriation of the land by the occupant to his own use. There was evidence that after plaintiff's land was fenced in with that of Filson the latter openly and tacitly recognized that plaintiff was the owner of the tract. It is not uncommon, as we have seen, for cattlemen to fence in with their own the unused land of nonresidents, and they do this without any intention of acquiring title to the tracts so inclosed. Filson built his pasture fence around a number of tracts which he did not own. In negotiating a sale of his ranch in 1905, long after the fencing in of plaintiff's tract, he informed the proposed purchaser that the tract in question belonged to the plaintiff, and that it could be obtained at a reasonable price. At that time he discussed with the purchaser how soon the owner of this land, as well as the owners of other lands inclosed within the pasture, might wish to occupy and use it, and Filson then said he "could get it later on very cheap." The purchaser testified that at that time Filson did not make any claim to the ownership of the plaintiff's land. At another time Filson inquired as to the price of the land in question, and when it was given to him he stated that when he closed up a deal that he had on hand he would have the money and would buy the tract. While Filson's brother was in charge of his ranch, litigation arose between the brother and one Laird, who owned a tract of land inclosed in the pasture, over the destruction of Laird's crops on his land. The plaintiff, who was a friend of Laird, aided in the settlement of the controversy, and it was then agreed that if Filson and his brother would fence out Laird's land they should have



permission to use the plaintiff's land, and acting upon this agreement Laird's land was fenced out. It appears that during this long period, while the plaintiff's land was inclosed in the pasture, Filson allowed the plaintiff to pay the taxes on the tract. This is not a controlling circumstance, but it is one of the means whereby a claim of ownership is asserted, and the failure to pay taxes for so long a time tends to weaken a claim of ownership by adverse possession. (1 R. C. L. 699.) At one time the plaintiff overlooked the payment of his taxes, and the tract was sold to the county for the delinquent taxes, and subsequently Filson obtained an assignment of the certificate. When the land was redeemed Filson accepted the redemption money that was paid. The plaintiff testified that the first intimation he had of the adverse claim to the land was in 1913, when he went to pay his taxes and found they had been paid by another. The facts and circumstances in evidence tend to sustain the theory of the plaintiff and the decision of the court. It devolves upon one claiming title by adverse possession to clearly make out his claim. It has been said that "adverse possession is to be taken strictly, and every presumption is in favor of a possession in subordination to the rightful owner. Title by adverse possession, therefore, must be established by clear and positive proof. It cannot be made out by inference." (1 R. C. L. 695.)

There appears to be abundant proof to sustain the finding of the court, and therefore the judgment is affirmed.

No. 21,362.

E. C. FAIR, *Appellee*, v. THE UNION TRACTION COMPANY,  
*Appellant*.

## SYLLABUS BY THE COURT.

**AUTOMOBILE—Collision with Street Car—Proximate Cause—Contributory Negligence.** The evidence and findings considered, and *held*, the proximate cause of a collision between a street car and an automobile was the unlawful speed at which the automobile was driven, although at the moment of collision the automobile was moving at a lawful rate of speed. *Held further*, the plaintiff, who was an occupant, but not the driver, of the automobile, was guilty of negligence which contributed to his injury.

Appeal from Montgomery district court; JOSEPH W. HOLDREN, judge. Opinion filed March 9, 1918. Reversed.

*John J. Jones*, of Chanute, and *Chester Stevens*, of Independence for the appellant.

*Thomas E. Wagstaff*, of Independence, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one for damages for personal injuries sustained through the collision of one of the defendant's street cars with an automobile in which the plaintiff was riding. The plaintiff recovered, and the defendant appeals.

The automobile was driven by a doctor who was a friend of the plaintiff, and who was taking the plaintiff to his home at about eleven o'clock at night. Myrtle street in the city of Independence extends east and west. Myrtle street is crossed by streets running north and south, numbered consecutively from east to west. The plaintiff lived on the south side of Myrtle street, just west of Thirteenth street, which is fifty feet wide. In front of the plaintiff's home Myrtle street is forty feet wide. The street-car track is laid in the center of Myrtle street. At Ninth street the automobile, going west on the north side of Myrtle street, passed the street car, which was westbound. The automobile proceeded at the rate of about twenty-five miles per hour until Thirteenth street was reached. The driver then commenced to reduce speed in order to make the contemplated

turn to the south to the plaintiff's home. The driver first turned to the right until near the north curb of the street, and then executed a curve to the south, going at the rate of about five miles per hour. As the automobile was crossing the street-car track, fifty-five or sixty feet west of Thirteenth street, it was struck by the street car, which was running at the rate of twenty to twenty-five miles per hour. The street car was equipped with headlights much like those of an automobile, and could be stopped within two hundred feet when running at the rate of twenty-five miles per hour.

The cause was submitted to the jury on the plaintiff's evidence, after a demurrer to the evidence had been overruled. The plaintiff and the automobile driver both testified that the plaintiff gave the driver no instructions or directions with reference to the management or operation of the automobile. The plaintiff testified as follows:

"Q. Now the street car was moving off just as you went by it? A. Yes, if I remember rightly it started up just as we went by.

"Q. Going in the same direction that you did? A. Yes, sir.

"Q. And the doctor went fast in order to keep ahead of the car? A. Yes, sir.

"Q. You knew that that street car was following you right down the street? A. That is the reason we were trying to get ahead of it or get away from it.

"Q. And for the purpose of getting away from that car you drove fast, as fast as twenty-five miles an hour? A. Yes.

"Q. You were perfectly familiar with that street car and the street-car track and the street? A. Yes, sir."

Among the defenses pleaded were the contributory negligence of the plaintiff and the excessive rate of speed of the automobile. The court refused to instruct the jury with reference to the statutory duty to operate automobiles on city streets at a rate of speed not in excess of twelve miles per hour. With the general verdict for the plaintiff, the jury returned special findings of fact, which follow:

"Q. No. 1. How far east of the point of collision could the approaching street car have been seen on the night of January 7, 1916, by one at or near the place where the automobile commenced to turn toward the track? A. 200 feet.

"Q. No. 2. Is it not a fact: (a) That the automobile was racing with the street car immediately before the collision? A. No. (b) That in order to keep ahead of the street car, the automobile was traveling at the rate of about twenty-five miles per hour from about the intersection of

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Ninth and Myrtle streets to about the intersection of Thirteenth and Myrtle streets? A. Yes. (c) That the plaintiff knew these facts? A. Yes.

“Q. No. 4. How far was the street car from the point of collision when the automobile started to cross the street-car track? A. About 150 feet.

“Q. No. 5. If the automobile at no time had run at a rate of speed to exceed twelve miles per hour, could the collision have occurred at the time, place, or in the manner in which it did occur? A. No.

“Q. No. 6. Did the plaintiff or Doctor Alford, at any time, warn or otherwise inform the motorman that the automobile was about to cross the street-car track? A. No.

“Q. No. 8. After the automobile crossed Ninth street, did the plaintiff know that the street car was following the automobile in which he was riding? A. Yes.

“Q. No. 9. If you find for the plaintiff, in what respect do you find the defendant, its agents, servants and employees negligent? A. Running too fast, not using proper signals.”

A motion for judgment in favor of the defendant on the special findings was denied.

Since the plaintiff admitted and the jury found the plaintiff knew the street car was following the automobile, signals would have conveyed no information, and the jury were not warranted in basing their verdict on failure of the defendant to use proper signals. If by their finding relating to negligence the jury meant the defendant was negligent because the street car was operated at too great a rate of speed, in connection with the fact proper signals were not given, there was no basis for the verdict. If, however, the jury meant the defendant was negligent in two distinct and independent respects—running too fast and not using proper signals—the verdict must rest on the first ground alone. The only direct evidence bearing on the subject of proper speed for the street car was that of a former employee of the defendant, who said cars were ordinarily operated at the rate of twenty to twenty-five miles per hour. There was testimony that Myrtle street was one of the principal thoroughfares of the city, used by automobiles, street cars, buggies, and pedestrians, but the extent to which the street was used late at night was not shown, and there was no evidence whatever that any vehicle besides the automobile in which the plaintiff was riding was using the street, or that any

person crossed the street during the time the street car and the automobile moved from Ninth street to the point of collision. The evidence of several of plaintiff's witnesses was that the street was lighted and a person could see all the way up Myrtle street from Thirteenth to Ninth. The jury, therefore, resorted to some standard not revealed by the evidence for the finding that the defendant was negligent in respect to the speed of the street car. Granting, however, the car was operated at too great a rate of speed, we have this result: Two power-propelled conveyances go forward from a point on the same street, at the same time, in the same direction, at the same general rate of speed, and under the same conditions, except that one is confined to a fixed course while the other has a choice of courses and can be stopped more quickly. The one having greater freedom of movement turns in front of the other, and they collide. The street car is negligently used. The automobile is not. Manifestly there is something wrong with a verdict announcing such a conclusion.

The court is of the opinion the unlawful speed of the automobile directly and proximately contributed to the collision. The admitted purpose of the plaintiff was to reach his home on the south side of Myrtle street, beyond Thirteenth. The proper route was taken. To make the required turn across the street-car track to the plaintiff's home it was necessary to reduce the speed of the automobile. The speed was reduced to five miles per hour, and at the moment of the collision the automobile was not violating the statute. The statute fixes the maximum rate of speed for country roads as well as for city streets. If an automobile driver going to town should violate the statute several times on level stretches of good road, but on reaching the city limits should observe the law, and after driving several blocks should collide with a street car, his fast driving would bear no causal relation to the final event. The meeting of the automobile and the street car would be a mere fortuity. In this instance the causal connection is quite manifest. The finding of the jury that the automobile was not racing with the street car *immediately* before the collision is technically correct. The contest of speed ended a few seconds before the collision, when the automobile reached the point where it was obliged to slow down. All that high speed could accomplish was accomplished.

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But for the distance of four blocks the automobile maintained twice the lawful rate of speed, for the purpose of keeping ahead of the street car, which is racing. The ultimate goal was the plaintiff's home, and slackening speed to make the turn across the track was merely a method of reaping the reward of the unlawful conduct. The jury properly found that the collision could not have occurred if the automobile had been operated at lawful speed, and the violation of the statute was a contributing cause of the collision.

While the driver of the automobile was a doctor, he was not answering an emergency call demanding excessive speed. (Gen. Stat. 1915, § 506.) He was taking the plaintiff home. Although the drive was made for the plaintiff's convenience and benefit, it may be conceded the plaintiff was merely the driver's guest. To accomplish the desired end a flagrant violation of a statute enacted for the public safety was persisted in for a long distance down Myrtle street. By the frank admissions contained in the plaintiff's testimony printed above, he identified himself with the unlawful enterprise. He approved it, consented to it, and participated in it. He said, "that is the reason *we* were trying to get ahead of it." Consequently, he was personally negligent, within the principles stated in the case of *Anthony v. Kiefner*, 96 Kan. 194, 200, 201, 150 Pac. 524.

The plaintiff and the automobile driver both testified that before the turn was made they looked back and saw no street car. They described the conditions and related what they did. The jury found, however, that the street car could have been seen for a distance of 200 feet when the automobile commenced to turn toward the track, that the street car was 150 feet away when the automobile started to cross the track, and that the plaintiff knew the street car was following the automobile. The plaintiff had been identified with a violation of the speed law, the consequences of which were to be estimated and met. Under these circumstances the plaintiff was chargeable with what he could have seen when leaving a place of safety for a place of danger, and judgment should have been rendered for the defendant on the special findings of the jury.

The judgment of the district court is reversed, and the cause is remanded with direction to enter judgment for the defendant.

No. 21,368.

M. S. GILLIDETT, *Appellee*, v. JAMES H. HAYDEN, *Appellant*.

## SYLLABUS BY THE COURT.

**CONTRACT—Sale of Land—Interest on Payments—Title.** A contract for the sale of land provided that the buyer should pay interest at seven per cent on the agreed price from the date the title was approved; it also contained a provision that he should pay the interest on an existing mortgage on the land for \$4,000, bearing eight per cent, until the date named for the payment of \$5,000 on the purchase price; in an action in which the sole controversy was as to the date when, by the approval of the title, the buyer became liable for interest, *held*, that the existence of such mortgage could not be regarded as an obstacle to the approval of the title, at least where by oral evidence an understanding was shown to the effect that the mortgage was to be satisfied out of the \$5,000 payment.

Appeal from Meade district court; LITTLETON M. DAY, judge. Opinion filed March 9, 1918. Affirmed.

*Frank S. Sullivan*, of Meade, for the appellant.

*H. Llewelyn Jones*, of Meade, for the appellee.

The opinion of the court was delivered by

MASON, J.: On March 4, 1915, a written contract was entered into for the sale of land by M. S. Gillidett to James H. Hayden. It provided for the payment of \$1,100 down and \$5,000 on August 1, 1915, and for the giving of a mortgage for the balance of \$14,000, with interest at seven per cent from the date titles were approved. The deal was carried out, but in the settlement interest was computed only from August 1, 1915. Gillidett brought an action against Hayden alleging that the title had been approved on March 6, and asking for interest from that date to August 1, amounting to \$392. The plaintiff recovered, and the defendant appeals.

At the conclusion of the plaintiff's evidence the defendant demurred. The demurrer was overruled, but the plaintiff asked leave to introduce further evidence. The request was granted, and more evidence was given. The demurrer was then renewed, and again overruled. The defendant assigns error upon each of these rulings. The reopening of the case was within

the discretion of the trial court, and the only substantial questions involved are whether incompetent evidence was admitted, and whether the evidence was sufficient to support a finding that the title was approved on March 6.

On that date the attorney who made the examination for the defendant reported that the title was good and marketable, subject to a mortgage for \$4,000. He added that if any improvements had been made within four months, proof should be furnished that the labor and material had been paid for, and that if the land was occupied by any one other than the plaintiff, inquiry should be made as to the claims of the occupant. In other words, the effect of the report was that the record title was clear (subject to the mortgage), but that grounds for mechanics' liens might exist without a lien statement having been filed, if improvements had been made within four months, and that a claim under an unrecorded instrument might be good if made by some one in possession. There is no suggestion that any such improvements were made, or that any one else was in possession, and these matters did not involve any delay in passing on the title, and apparently are not relied upon as having had that effect. But the mortgage referred to was not released until the \$5,000 was paid, in August, being satisfied out of that payment. The defendant maintains that the title was not cleared and was not approved until the mortgage was discharged, and that he should not be required to pay interest until that time.

The plaintiff contends that within the meaning of the contract the title was to be regarded as approved when he had shown to the satisfaction of the defendant his ability to perform his contract; that the existence of a mortgage for a less amount than the payment to be made in August did not prevent the approval of the title; and that if there would otherwise have been any doubt about this proposition, it was put at rest by the fact (to which he testified) that there had been an understanding between the parties that the mortgage was to be paid out of the \$5,000 installment due in August. The defendant insists that the plaintiff's testimony regarding this understanding was incompetent, because it was hearsay, being based on what others had told the witness. When the evidence was offered it was objected to only on the ground that it tended



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to vary the written agreement. On cross-examination it was developed that most of the plaintiff's information on the subject was derived from what his own agents had told him, but it was not made clear that he was entirely without direct knowledge concerning it.

The written contract contained a paragraph reading as follows:

"Said first party [the plaintiff] is to furnish within a reasonable time an abstract of title certified to date by a bonded abstracter, showing a good and merchantable title to the said premises, clear of all incumbrances or liens except. It is also agreed that said purchaser is to pay the interest on a certain \$4,000 mortgage now on said land from date of contract to the date the \$5,000 payment is made at 8 per cent."

The provision that until the time arrived for the payment of the \$5,000 installment the purchaser should pay interest on the \$4,000 mortgage at 8 per cent—that being the rate borne by the mortgage debt—seems inconsistent with the idea that the existence of the mortgage could constitute an obstacle to the approval of the title. It plainly suggests an expectation of the parties that the mortgage should be satisfied out of the \$5,000 payment. If it does not in itself amount to an agreement to that effect, it forms a basis for the admission of oral evidence to show that such was the understanding of the parties. We therefore think that there was no error in the admission of the testimony referred to, and that the evidence is sufficient to support the decision.

The judgment is affirmed.

No. 21,131.

ROBERT C. POSTLETHWAITE, as Administrator, etc., *Appellee*,  
v. FRANK P. EDSON and JESSIE L. MCCABE, *Appellants*.

## OPINION ON REHEARING.

## SYLLABUS BY THE COURT.

1. **WILL**—*Not a Conveyance or Alienation of Real Estate*. Rule followed that a will is not a conveyance or an alienation of the real estate described therein.
2. **SAME**—*Devise of Homestead—Rights of General Creditors*. "Creditors," as the expression is used in section 11752 of the General Statutes of 1915 concerning wills, means and includes general creditors.

Appeal from Shawnee district court, division No. 2; GEORGE H. WHITCOMB, judge. Opinion on rehearing filed March 9, 1918. Former opinion adhered to. (For original opinion see *ante*, p. 104.)

*Eugene S. Quinton*, of Topeka, for the appellants.

*T. F. Garver*, and *R. D. Garver*, both of Topeka, for the appellee.

The opinion of the court was delivered by

WEST. J.: A rehearing was granted on the homestead question only, and for the third time this controversy has received somewhat unusual attention. (*Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802; *Id.* 102 Kan. 104.)

The right to will away real estate is not inherent, but is purely a creature of legislation. The legislature may give, and the legislature may take away.

"The legislature has plenary power to withhold or grant the right, and, if it grants it, may make its exercise subject to such regulations and requirements as it pleases." (40 Cyc. 997.)

When this matter was attended to in this state, it was enacted that one may give and devise property by will, "subject nevertheless to the rights of creditors and to the provisions of this act." (Gen. Stat. 1915, § 11752.) This is all the power that has ever been given. The legislature has not added, and the courts cannot add, thereto.

Section 9 of article 15 of the constitution sets apart certain property as a homestead which "shall not be alienated without

the joint consent of the husband and wife, when that relation exists. . . ." Section 8 of the descents and distributions act (Gen. Stat. 1915, § 3831) sets apart one-half in value of the husband's estate of which the wife has made "no conveyance." In *Comstock v. Adams*, 23 Kan. 513, the sole question for consideration, as expressly stated in the opinion, was whether a will is a conveyance under the section last referred to, and after painstaking consideration the court unanimously held that it is not.

In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, the point was whether a will is an alienation under the section of the constitution referred to, and after a still more elaborate discussion it was unanimously held that it is not, and *Comstock v. Adams* was followed with approval. In *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694, these two decisions were referred to and reaffirmed. The first of these was rendered in 1880, the second in 1889, and the third in 1892, and in all these years neither the people, the legislature, nor the courts have sought to change the rule of property thus embedded in the judicial system of this state. While loose expressions touching wills may be found, in no instance has this court decided anything to impair the force of this rule.

In *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569, it was said (p. 273) that when death occurs the title to the property of the person dying must be transferred to some person, that it cannot remain in the deceased, and the will simply designates where the title shall go.

In *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, it was said that a will never divests the owner of his property; that when the testator dies the devisee mentioned in the will takes the property by virtue of the statutes.

"It would not be the will, however, but death that would take the property from the testator; and it would be death, the statutes, and the will, all operating together, that would confer the property upon the devisee." (p. 611.)

Also,

"It is not the will alone, however, that determines where the title shall go, for the will operating alone would be powerless. It is the will, and death, and the statutes, operating together, that determine where the property shall go. Indeed, it is the statutes which give force and efficacy to all." (p. 612.)

After going over the matter again at length it was said :

"We think it appears from the statutes and from the decisions of the supreme court, that the legislature, the governor, and the supreme court, have always been of the opinion that the aforesaid constitutional provision has nothing to do with the question as to where the title to real estate, occupied as a homestead, shall go after the death of the owner of such real estate. It is evident that it has always been their opinion that the word 'alienated' as used in said provision means only a passing of some estate, title or interest in the homestead *from* the owner *during his lifetime*, and that it has no reference whatever to where his title or interest shall go after his death. These statutes and decisions have all the force and effect of a contemporaneous exposition of the true intent and meaning of this constitutional provision." (p. 620.)

A homestead always contemplates a place for the residence of a family, and its character as exempt property is derived only from the fact of such occupancy. In *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, the doctrine of family was expanded and applied to the case of a widow occupying the homestead after the death of her husband. This was carried still further in *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, holding that the homestead right may persist in the survivor without regard to which held the legal title or the time when the indebtedness to pay which it was sought to be sold was incurred. Another modification was made in *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228, two members of the court dissenting, wherein it was decided that a sale in partition is not a forced sale, and that distribution of the homestead may be had by the adult children while it is still occupied by the widow.

It is now argued that another enlargement should be made, and that the property in this case, not claimed to have been occupied by the present owners as a homestead, should be deemed exempt from the debt sought to be enforced against it. Of course this means a reversal of the decisions referred to and the establishment of the contrary rule. It is argued that creditors should be construed to mean those holding claims which could in the lifetime of the testator be enforced against the property. In other words, that the power to devise given by the legislature does not mean subject to the rights of creditors generally, or general creditors, which would be its natural meaning, but subject only to the rights of what might be called actual or potential lien holders, such as materialmen or those holding

claims for the purchase price. But the same legislature which thus restricted the making of wills enacted that the homestead should not be exempt from sale for taxes, improvements, purchase price, or liens given by consent of both husband and wife. Hence, creditors other than these must have been meant when using the phrase, "subject . . . to the rights of the creditors." Of course the phrase does not mean creditors whose eyes could not be turned toward the homestead, for all understand a homestead to be exempt from the claims of general creditors.

The phrase "subject . . . to the rights of creditors" must, according to the act on statutory construction, be construed according to the context "and the approved usage of the language." (Gen. Stat. 1915, § 10973, subdiv. 2.) If only actual or potential lien holders were intended there was no occasion to use this language at all, because they were already protected by the constitution and the statute as above shown. Hence, the argument that only creditors who could have looked to the homestead in the life of the intestate were intended, falls to the ground. In *Monroe v. May, Weil & Co.*, 9 Kan. 466, Mr. Justice Brewer, in speaking of the homestead right, said:

"A man may sell his homestead, and give good title, no matter how many judgments may be standing against him." (p. 475.)

Again,

"Nor is there anything in the transaction of which creditors can complain, or upon which they can base any equity. . . . If placing the title in the wife's name had removed so much property from the reach of their claims, it might have given them some pretense for insisting that no more property should be thus removed. But where the homestead is alike exempt, whether in the husband's or wife's name, we fail to see why placing it in the wife's name gives the creditors a right to call that a gift which the parties made a payment." (p. 476.)

It is quite manifest that in this discussion general creditors were the ones referred to. In *Colby v. Crocker*, 17 Kan. 527, the plaintiff, who had loaned the owner \$800 for which he had no security, sought to require a mortgagee to first exhaust the homestead property. It was said:

"The homestead-exemption laws provide in effect that the homestead shall be exempt from all debts except for purchase-money, taxes, improvements, and liens given by the consent of both husband and wife. Now the plaintiff's claim does not fall within any of these exceptions." (p. 531.)

He, therefore, must have been a general creditor like the plaintiff in the case before us. In *La Rue v. Gilbert*, 18 Kan. 220, a judgment was obtained against a homestead owner whose family continued to occupy after his death. The holder sought to require the mortgagee of the homestead and other real estate to exhaust the homestead property first. This was refused. Mr. Justice Brewer said:

"In giving a mortgage on the homestead, the debtor waives this homestead right, but only to the mortgagee, and does not thereby open the door to other creditors, or increase their equities." (p. 222.)

In *Hixon v. George*, 18 Kan. 253, in discussing the claims of creditors who questioned the right of a husband to purchase land with his own money and put it in his wife's name and hold it as a homestead, it was declared that—

"It would have made no difference if the title to the property had been taken in George's name, and not in his wife's name. In either case, the property would have been exempt from the claims of any general creditor of either George or his wife." (p. 258.)

In *Sproul v. Atchison National Bank*, 22 Kan. 336, the court held:

"It is not illegal or fraudulent to hold property in a homestead exempt from the claims of general creditors; and the right of the homestead occupants to so hold such property is paramount to any right of any general creditor." (Syl. ¶ 2.)

In *Long Brothers v. Murphy*, 27 Kan. 375, it was held that an insolvent debtor having creditors pressing for the payment of their claims could not take goods purchased upon credit and exchange them for real estate, and hold it as a homestead against such existing creditors.

*Henderson v. Stetter*, 31 Kan. 56, 2 Pac. 849; *Stratton, Adm'r, v. McCandliss*, 32 Kan. 512, 4 Pac. 1018; *Frick Co. v. Ketels*, 42 Kan. 527, 22 Pac. 580; *Loan Association v. Watson*, 45 Kan. 132, 25 Pac. 586; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697; *Batthey v. Barker*, 62 Kan. 517, 64 Pac. 79; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558; *Hopper v. Arnold*, 74 Kan. 250, 86 Pac. 469; *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074; *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745; *King v. Wilson*, 95 Kan. 390, 148 Pac. 752; *Milberger v. Veselsky*, 97 Kan. 433, 155 Pac. 957; *Scott v. Rodgers*, 97 Kan. 438, 155 Pac. 961; *Fredenhagen v. Nichols & Shepard Co.*, 99 Kan. 113, 160 Pac.

997; and *Walz v. Keller*, 102 Kan. 124, 169 Pac. 196, all involved controversies between homestead claimants and general creditors, and no distinction can be found between those which did and those which did not involve wills.

In *King v. Wilson*, 95 Kan. 390, 148 Pac. 752, this is found:

"Was it necessary for the plaintiff to allege that the former judgment was not for an obligation contracted for the purchase of the premises, or for the erection of any improvements thereon? In suits for the protection of the homestead right it is not necessary to allege that the debt sought to be enforced against the property is not embraced within any of the exceptions." (p. 393.)

In *Cross v. Benson*, 68 Kan. 495, the following is found:

"And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will was subject." (p. 506.)

There can be no question that in this expression general creditors were meant.

The trouble is that we have no homestead in this case—simply some real estate which ceased to be a homestead when it ceased to be occupied as such.

"The homestead interest is not an estate in land. . . . It is an exemption of land under stated conditions. If the conditions do not exist, or having once existed are at an end, the exemption ceases." (*Ellinger v. Thomas*, 64 Kan. 180, 185, 67 Pac. 529.)

If the homestead had at any time been abandoned by the widow of the judgment debtor, while such judgment was kept alive, it would at once have become subject to proper process for its payment. Had the makers of the will died intestate leaving no family in possession, the property would likewise have become subject to the rights of the judgment holder. The fact that the will designated to whom it should go is now sought to be exaggerated into a continued exemption in the hands of the devisees.

There is no potentiality in the oft used and frequently abused expression that the eye of the creditor need never be turned towards the homestead, to justify a holding that property continues to be a homestead after it ceases to be one.

But it is argued that the will and the death and the statute together vested the title in the defendants. It certainly cannot

be said that the death conveyed any property to any one, it simply removed the present owner from this life. Indeed, counsel himself says in his brief that "Death transfers nothing." It was long since settled law that the will did not and could not convey or alienate the land. The statute directed that it should go according to the desire expressed in the will—but only after probate—(Gen. Stat. 1915, § 11784), and while these three insufficient causes may when combined produce the effect of a conveyance—which neither could do alone—there is nothing in the situation to give the will a potency not accorded to it by the statute.

While the eye of the creditor need never be turned toward the homestead of the debtor, this situation continues only so long as it is a homestead. The only reason possible to be advanced for having a homestead provision is the protection of the family, and when, under our recent decisions, no member of the family continues to occupy it the homestead character *ipso facto* ceases. When the survivor in this case departed this life, no one was left in possession claiming or who could claim any sort of homestead rights. The devisees took by force of the statute, which compelled them to take subject to the rights of creditors who, having kept their judgment alive, had a right to look at this property as soon as it ceased to be a homestead, which it did upon the death of the survivor.

While the testators might during their occupancy of the homestead have conveyed it away by deed, and while the creditors might not be able to show that they were in any wise defrauded thereby, this was not done. It could have been done regardless of this will or any other will that might have been drawn, but it was not done. Instead of conveying the property away, the owners and occupiers chose to exercise their rights to designate where and how it should go at their death—only this and nothing more.

It is said that death is not an abandonment. Very well, but suppose the devisors had died simultaneously while in possession, whose homestead would it have been? It is not claimed to be the homestead of any one now, and it is not. The theory is advanced that by some sort of inherent efficacy the will carried over the exemption or the exempt quality of the land to the devisees. Why? Because a deed would have



done so, forsooth. But a deed would have evidenced a present and complete divestiture and investiture of title. A will is powerless to do this. Being a mere creature of statute, it can, at the utmost, result in designating the beneficiary, subject to the rights of the creditors of the devisor. Had this will expressly provided that it was made subject to the rights of the devisor's creditors, it would simply have contained what the statute writes into every will as effectually as if inserted by the maker himself.

"Legatees succeed to the estate of the testator as beneficiaries and objects of his bounty, and have no rights or equities whatever as against creditors whose debts existed in the testator's lifetime, and this applies even to a legacy based on a valuable consideration. It has even been considered that the creditors have a lien on property which the testator has specifically devised or bequeathed by his will." (40 Cyc. 2060.)

The statute has not said that the owner of a homestead may not convey it away by deed. This he may do, and, unless he thereby works a fraud upon his creditors, this right is in no wise impaired, but the statute has, in effect, said that he may not will his homestead away without preserving the rights of his creditors.

There is no possible reason in justice or equity why one should prefer a relative or a stranger who already has a homestead, and who owes him nothing, to a creditor who may have furnished him the very means of subsistence for years without return.

The answer to the contention that if a deed cannot defraud creditors a will cannot, is that the one is an inherently free act and the other a matter restricted and limited by law, whose limits cannot be passed without violating the law itself.

The point in *Cross v. Benson*, supra, was that, although the widow took under the will, subject to the rights of creditors, she could not be ousted of her occupancy so long as it continued, because such occupancy was paramount to her rights as devisee.

When the constitution was framed and adopted the country was new and land was of small value, but 160 acres of land and the improvements thereon in many cases now amount to a fortune of many thousands of dollars. If one owning such

a homestead now can, by being the beneficiary in the will of another homestead, hold such other property free from the debts of the testator, then it would seem, indeed, that the effect if not the object of the exemption law is not to protect the family, but to defeat debts.

The former decision and opinion are adhered to.

PORTER, J. (dissenting): A rehearing was granted on the homestead question only, and the sole question is whether under the will the property occupied by the testators in their lifetime as a homestead passed to the devisees free from the debts of Willis Edson. The question now under consideration has never been squarely before this court, and we are confronted at the outset with the established proposition of law that the owner may sell and convey the homestead—may even make a transfer of the same with the avowed purpose of defeating his creditors, and such sale, conveyance or transfer will not render the property liable for his debts. In other words, it is absolutely exempt. The constitutional provision reads:

"A homestead . . . shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of the husband and wife, when that relation exists. . . ." (Art. 15, § 9.)

In *Monroe v. May, Weil & Co.*, 9 Kan. 466, it was said:

"The homestead is something toward which the eye of the creditor need never be turned. It is an element which may never enter into his calculations in his efforts to collect his debt. He may as well ignore that as he does now (except in cases of fraud) the body of the debtor." (p. 476.)

First, it is insisted the main question involved is no longer an open one in this state, for the reason that in a number of well-considered cases it has been held that a will is neither a "conveyance" as referred to in the statute, nor an "alienation" within the meaning of that word as used in the homestead clause of the constitution. Second, it is insisted that under the statute of wills the devisees in any will take the property "subject nevertheless to the rights of creditors." (Gen. Stat. 1915, § 11752.)

In support of the first of these contentions the cases of *Comstock v. Adams*, 23 Kan. 512, and *Vining v. Willis*, 40

Kan. 609, 20 Pac. 232, and other cases following and approving them, are relied upon.

There was, however, no principle of law actually involved in the Comstock case, the decision of which settled the question to be determined here. The statute there considered was the statute of descents and distributions (Gen. Stat. 1915, § 3831), giving the wife an inchoate interest to the extent of one-half of the husband's real estate owned by him at any time during the marriage, and particularly that portion of the section which reads, "That the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a *conveyance*, when the wife, at the time of the conveyance, is not or never has been a resident of this state." The point decided was that the will was not a "conveyance" within the meaning of this statute. To understand the force and effect of the decision, it is necessary to recall the purpose and intent of the statute which the court was then construing. It was an early-day statute enacted to meet peculiar conditions then existing, when the state was new and was rapidly being settled by men who came from distant communities. It was not uncommon then for a person to represent himself and to pass as single and unmarried, when, in fact, he had a wife living in some other state; sometimes the separation resulted from her refusal to reside in Kansas, sometimes from other reasons. The purpose of the statute was to facilitate the conveyance of land titles, and to protect those purchasing land by ordinary deeds of conveyance executed by one residing here and claiming to be single and unmarried, but who possibly had a wife living somewhere else. At the time it was enacted the means of communication with eastern settlements and distant states was slow and uncertain. There cannot be the slightest doubt as to the intention of the legislature; it was to relieve the purchaser from the difficulty of establishing a negative fact, that is, that the grantor had not a wife living elsewhere, instead of at the home of the husband, where a wife is usually found residing. To have held that the word "conveyance" was intended to embrace all kinds of conveyances, and to include a will, would have been manifestly contrary to the spirit and purpose of the statute. It could not have been the intention to protect

the rights of devisees under a will, because they need no such protection, since the wife is not a necessary party to the husband's will. It is manifest that the word "conveyance" was employed in the same sense as though the statute had been made to read "*deed or covenant of conveyance*," because the legislature was enacting this particular clause for the sole purpose of dispensing with the necessity of the absent wife joining in the instrument. All that was necessary in the decision was to determine whether the statute so intended, or, on the other hand, should be construed as giving the husband power to exclude by will (to which she had not assented) the rights given her in other statutes to receive after his death one-half of his property. While the decision was placed mainly upon a consideration of the different manner in which title passes by will and by deed, and a narrow instead of a broad construction of the word "conveyance," nevertheless the court readily determined and, in part, rested its decision upon a consideration of the statute in connection with the provisions in the same and other statutes intended to protect the wife's rights in the husband's property, and held that the particular statute there involved did not give to the husband the power "to exclude by will, against the consent of his wife, her right to receive after his death one-half of his property, real and personal, although she may never have been a resident of Kansas." (Syl. ¶ 3.) The entire opinion, so far as it bears upon the particular statute, reads:

"We do not think that Ira Comstock had the power to exclude by will, and against the consent of his wife, Avis F. Comstock, her right, after his death, to one-half of his property real and personal, although she may never have been a resident of Kansas; and we think the statutes conclusively settle this question. Secs. 8, 17, 31, and 32 of the act relating to descents and distributions, Comp. Laws of 1879, pp. 379, 380; §§ 1 and 35 of the act relating to wills, (Comp. Laws of 1879, pp. 1001, 1004.) The word 'conveyance' as used in the proviso of said § 8, clearly does not include a will. A will is never a conveyance. A conveyance operates in the life-time of the grantor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will 'a conveyance,' 'which the husband has made.' It is the death that transfers the property. Besides, if we should hold that the will and death taken together constitute 'a conveyance,' 'which the husband has made,' under said § 8, we would overturn other provisions of

*the statutes contained in said §§ 17 and 85. This we cannot do.*" [Italics added.] (p. 524.)

Section 17 of the statute of descents and distributions, to which the writer of the opinion referred, reads: "The widow's portion cannot be affected by any will of her husband, if she objects thereto. . . ." (Gen. Stat. 1915, § 3840.) And section 35 of the act relating to wills, to which he referred, reads: "No man, while married, shall bequeath away from his wife more than one-half of his property." (Gen. Stat. 1915, § 11790.)

By way of comment, and by what may, perhaps, be called a refinement of reasoning, the writer of the opinion drew a distinction between a will and a conveyance generally, based upon the difference in the manner by which wills and deeds operate to convey property. The same process of reasoning might lead to confusion according to the sense in which the word "deed" is used, by which we sometimes mean the written instrument itself, duly executed, but not yet delivered; without which it is not in one sense a deed, and yet in one sense it is. The register of deeds, for example, may be compelled at the instance of a third party to record it as a deed. He has no means of determining, nor any duty to determine, whether it has been delivered. When we speak of a deed as conveying property we assume that the instrument was not only executed, but was delivered. We might, but seldom do, go further and consider that the deed would not constitute a conveyance except by force of law authorizing property to be thus transferred; and that we have a "statute of conveyances," which regulates what estate is conveyed by different kinds of deeds. The statute not only provides what a deed shall contain, but declares what interest in real estate "passes" or is "conveyed" thereby (using these expressions interchangeably as does the statute of wills). Nor would accuracy of statement require us to say that the deed alone does not convey, but that the instrument, together with delivery, and the law, operating together, constitute it a conveyance. After having been fully executed, it may or may not be delivered. That rests upon a contingency. So, whether a will duly executed shall remain unrevoked is an uncertainty, which generally cannot be known or determined until the death of the

testator; but it requires a refinement of reasoning, which leads nowhere, to say that it is the death of the testator that conveys the property, or that it is death and the law which operate as a conveyance. Of course, there must be a law, statutory or otherwise, to enable the testator to dispose of his property by will, just as it required a law to enable him to own it and manifest dominion over it in the first place. The will cannot and was not intended to take effect until the death of the person who executed it. His death was certain; the time when it should occur was uncertain. When death occurred the will operated as a conveyance of the property to the devisee. In abstracts of title, as well as in common parlance, and in judicial decisions, it is said that property passed by the will, not by any statute, not by death—but by the will; and its terms are often pondered and considered by the legal profession and by the courts in an effort to discover what the testator intended to convey.

The court considered all parts of the particular statute in connection with other statutes and construed them *in pari materia*, in order to give all of them force and effect if possible. (*The State v. Young*, 17 Kan. 414; *In re Hall, Petitioner*, 38 Kan. 670, 17 Pac. 649; *Wenger v. Taylor*, 39 Kan. 754, 18 Pac. 911; *Gilbert v. Craddock*, 67 Kan. 346, 72 Pac. 869.) Another rule of construction which, if followed, would have led the court to the same result is, that the meaning of a statute is to be derived from its general terms and manifest purpose (*Gleason v. Sedgwick County*, 92 Kan. 632, 635, 141 Pac. 584), and another rule equally applicable is, that a thing which is within the letter but not within the manifest spirit of the act is not in contemplation of the law.

Indeed, the second ground upon which the decision was rested is itself conclusive, and, in my opinion, more in accord with sound reasoning than the first. The statement in the opinion that “a will is never a conveyance” was not necessary to the opinion, nor was it an accurate statement of the law. That the word “conveyance” was given in the opinion a technical and restricted meaning is quite clear, because of the express language employed by the legislature in the statute of wills, and the language used by the court in numerous deci-

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sions in which it has been declared that a will does "convey" property and is a "conveyance." For instance:

The first section of the statute of wills authorizes the owner of real estate to "give and devise the same to any person by last will and testament." (Gen. Stat. 1915, § 11752.)

Section 33 provides that the will is not "effectual to pass real or personal estate" (Gen. Stat. 1915, § 11784) unless admitted to probate or recorded.

In section 57 of the statute, the legislature expressly construes a will to be a "conveyance." The section reads:

"When lands, tenements or hereditaments are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the *conveyance* shall be construed to vest an estate for life only in such part taken, and a remainder in fee simple in his heirs." (Gen. Stat. 1915, § 11808.)

Section 59 reads:

"Every devise of real property in any will shall be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate." (Gen. Stat. 1915, § 11810.)

In *Bennett v. Hutchinson*, 11 Kan. 398, Mr. Justice Brewer, after quoting the foregoing provision of the statute, said:

"It provides simply a rule of construction. It is like the clause in § 2 of the act concerning conveyances, . . . Its purpose, as all lawyers know, was to avoid the frequent controversies at the common law as to whether a devise passed only the life-estate or a fee simple." (p. 411.)

In numerous other sections of the statute of wills (35, 54, 58) the will itself is spoken of as passing the title.

In *Niquette v. Green*, 81 Kan. 569, 584, 106 Pac. 270, it was held that section 33 of the statute of wills "refers to wills generally which themselves pass title."

In *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87, it was said: "'Where property is given in clear language sufficient to convey an absolute fee, the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions.'" (p. 273.)

In *Breen v. Davies*, 94 Kan. 474, 146 Pac. 1147, it was held that "the word 'devise' is used in its popular sense, and relates to the disposal of personalty as well as real estate." (Syl. ¶ 1.)

There is not much force in the suggestion that the Comstock

case adopted a rule of construction which must be regarded as binding because the legislature has all these years permitted it to remain unchanged. The legislative declaration that "a will is a conveyance, and does convey" has also remained unchanged, and, as already noted, has often received the sanction of this court.

The opinion in the case of *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232, was also written by Mr. Justice Valentine, and he quoted with approval much of the comment of the former in respect to the manner in which a will operates, by force of death and the statutes, to dispose of property. The only question involved, however, was the construction of the word "alienation" as used in the homestead provision of the constitution, which declares that the "homestead . . . shall not be alienated without the joint consent of husband and wife." The title to the homestead in that case was in Mrs. Vining. The land was occupied by herself and husband as their homestead. She died leaving no children and left a will devising one-half of the land to the defendants. The husband sued to recover the property, claiming the will was void because it amounted to an "*alienation*" of the homestead without his joint consent. The syllabus, after stating the facts, declares the law to be that she could by will and without the consent of her husband devise a one-half or any less interest in the land to a third person so that such a third person takes the interest thus devised. This was all that was decided, and it was only necessary to give a restricted, in place of a broad, general meaning to the word "alienation" as used in the constitution. Of course, the owner of land comprising a homestead may dispose of it by will the same as any other property he owns, and it would be absurd to contend that he cannot. The statute of wills gave Mrs. Vining the power to bequeath away from her husband one-half of her property.

The supreme court of Illinois had occasion to consider the same question, and readily disposed of the contention by holding it to be "preposterous" to say that the word "alienation" in a homestead exemption law was intended to be used in its broadest sense and to include a disposition by will. In the opinion it was said:

"It ['alienation'] must mean a transfer or conveyance; such an one as the signature and acknowledgment of a party are proper to effect, as the law requires those acts as conditions to the alienation of the home-



stead. If the homestead exemption applies to the case of the descent of property, then it may be released in the mode provided by the statute, as an act contemplates that it may be released. But it would be preposterous to suppose the legislature intended any such thing, as that the 'signature and acknowledgment of the wife' should apply to the case of the operation of the law of descent." (*Turner v. Bennett*, 70 Ill. 263, 267.)

In the *Vining* case the court, after referring to the statute of wills and construing it in connection with the homestead provision, very properly gave a restricted meaning to the word "alienation." The opinion expressly states that the word sometimes is used in a broader sense so as to "include the transfer of property by will and death and the statutes; and perhaps this use of the word in such a case is not inaccurate." (p. 614.)

The courts differ upon the question whether the word "alienation" properly includes a transfer by will or devise. In *Lane v. Maine Mutual Fire Insurance Company*, 12 Me. 44, 48, it was said, "The word alien or alienate extends not only to alienations of land in deed, but also to alienations in law. A transfer of title by devise, . . . would be as technically an alienation as a transfer by deed." (To the same effect see *Burbank v. Rockingham F. M. I. Company*, 24 N. H. 550.) The correct rule of construction, and the one upon which the decision in *Vining v. Willis*, supra, was, in part, rested, may be stated substantially as follows: The word "alienable" may be broad enough to include dispositions by will, when not otherwise restrained by the context. But, where used in the same connection with respect to the joint consent of husband and wife, it cannot be said that it was intended to embrace testamentary dispositions. (See *Bouvier's Law Dictionary* and cases cited.)

We are not concerned in the present case, however, with the definition of the word "alienation," and what I have said with respect to the case of *Vining v. Willis*, supra, is merely to demonstrate that, although it has been relied upon as an authority, and although it approved and followed some of the dictum in the *Comstock* case, the decision itself determined nothing involved in the question now under consideration.

It is said that we have no homestead question here because the defendants neither occupy the premises nor claim a homestead right in themselves. However, we have a most impor-

tant question to determine for the first time, which affects the character and extent of the homestead right under the constitution; and in determining it we must not lose sight of the long-settled policy of this court that the homestead law must be liberally construed for the purpose of carrying into effect its beneficent provisions. Has the owner the right freely to dispose of it released from the claims of general creditors, or is his right to dispose of it free from the claims of general creditors restricted to a conveyance by deed, which must take effect in his lifetime and be accompanied by a surrender of possession and an abandonment of the premises as a homestead? It is conceded that he has the right to dispose of it in any manner he may see fit during his occupancy; that he may sell it or give it away; that he may do this with the avowed purpose to prevent his general creditors from ever obtaining any liens upon it, and that a deed of conveyance will have that effect.

The constitution itself places no restriction upon the owner's right to dispose by will of the property held as a homestead. Indeed, the constitution does not in express terms declare that he may sell and convey it free from the liens of general creditors, but that is the construction the court has always given to the constitution. The provision is, that the joint consent of the husband and wife is necessary to alienate or convey the homestead, when that relation exists. There is no question here of alienation without joint consent, because the will under which the defendants acquired the property was a joint and mutual will executed by the husband and wife. There being no restriction in the constitution as to the method by which a homestead may be conveyed or disposed of, how should the constitution be construed in determining whether the homestead guaranty includes the right to dispose of the property occupied as a homestead, by will or devise? I think this can be readily answered by reference to a few fundamental rules of construction which the authorities agree may properly be applied in order to interpret the meaning of constitutional provisions.

"It is a fundamental canon of construction that a constitution should receive a liberal interpretation, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen."

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Postlethwaite v. Edson.

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(6 R. C. L. § 44, citing *Prigg v. Pennsylvania*, 16' Pet. 539, and other cases.)

"A constitutional guaranty of the enjoyment of life, liberty and property carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty." (6 R. C. L. § 243.)

"Another important canon of construction of a similar nature which is frequently applied to constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power," citing *Gibbons v. Ogden*, 9 Wheaton 1. (6 R. C. L. § 43.)

In the same section it is said that—

"An exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. The rule is likewise well established that where no exception is made in terms, none will be made by mere implication or construction."

Applying these general rules of construction, it is plain that in one respect alone does the constitution limit the power of the owner of the homestead as to its disposition. The express exception relates to one particular matter. The owner may not alienate the property without the joint consent of the husband and wife while that relation exists. All the other powers and rights which the owner has in the homestead and which "are not included in such exception" the owner still possesses, including the valuable right to dispose of it in any of the recognized methods by which the owner can convey or dispose of his real estate.

Since the constitution places no restriction upon the right to convey, and contains no limitation as to the method by which the land may be disposed of, the legislature is powerless to create such restriction or limitation. Because the statute of wills declares that the owner of property shall have the right to give or devise the same to any person, "subject nevertheless to the rights of creditors," it is argued that the power thus to convey is created, coupled with a limitation or restriction which applies to the right an owner of land comprising a homestead has to convey it by a will. But, if we were to give the construction contended for to the language "subject nevertheless to the rights of creditors," still if there was included in the homestead guaranty the right of the owner to dispose of it by any of the recognized methods by which the owner may dispose of real estate, then the legislature may not restrict

the right. As said in *Cross v. Benson*, 68 Kan. 495, 506, 75 Pac. 558, "it can only be replied that the constitution is the paramount law and its mandates must be obeyed." In the opinion in that case it was said, in reference to the power of the legislature to restrict the homestead right by the provisions of the statute of descents and distributions, or by the statute of wills:

"It is further claimed that the taking of title under the will of a homestead owner necessarily abrogates the homestead right because a person must devise his lands 'subject nevertheless to the rights of creditors.' (Gen. Stat. 1901, § 7937.) This proposition ignores the persistence of the exemption from forced sale, independent of changes in the title already illustrated in the case of descent. In this case Sue S. Cross occupied the lots in question as a residence and as the family of the owner, H. C. Cross. By the will of the owner the title was devised to her and she elected to take under the will. But there was no hiatus in her occupation of the premises as a residence and as the family of H. C. Cross. The homestead privilege was no more disturbed than it would have been had H. C. Cross deeded the lots to his wife in his lifetime and while she was occupying them as a homestead. . . . And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death and during the following years until her own demise, creditors enjoyed no rights to which such lots were subject or to which the making of a will of them was subject." (p. 506.)

The opinion in *Cross v. Benson*, written by Mr. Justice Burch, has received recognition by other courts, text-writers and annotators as a leading case. It is reported in 64 L. R. A. 560, and is cited in 21 A. & E. Ann. Cas. 248, in a note on "The right to make testamentary disposition of homestead," wherein it is said:

"The power of the owner of a homestead to dispose of the same by his will depends in most instances on the statutes of the particular state creating the homestead, since those statutes usually contain either an express prohibition against such testamentary disposition, or other provisions which are held to exclude the exercise of such power. In the absence of a provision of this nature either in the constitution or statutes of the state, it is generally held that an owner may make a testamentary disposition of his homestead."

It is cited in 13 R. C. L. 647, in support of the rule that the use of merely formal phrases "will not make a devise of a homestead subject to the payment of the testator's debts. To do this, the language employed must be unequivocal and imperative."

The supreme court of Minnesota cites *Cross v. Benson*, in *Larson v. Curran*, 121 Minn. 104, 44 L. R. A., n. s., 1177. There it was held that where a decedent, leaving no surviving spouse, child or issue of deceased child, disposes of his homestead by his last will, the devisee takes it free from claims of creditors of the decedent, unless the testator clearly indicates an intention that the homestead shall be liable to the payment of his debts; and a general direction by the testator in the will to pay all his just debts out of his estate, followed by the devise of the residue, is not sufficient to indicate such intention. The Minnesota court had previously, in *Eckstein v. Radl*, 72 Minn. 95, held that "a testamentary disposition of the statutory homestead, assented to in writing by a surviving husband or wife, will not render the property liable to the satisfaction of the debts of the testator." In that case the court said:

"We quite agree with the trial court that the devise of a homestead does not render it subject to any liability for the payment of a devisor's debts. When living, the owner may sell and convey the homestead, or he may make a fraudulent transfer of the same, and such sale, conveyance or transfer does not render the property liable for his debts. It is absolutely exempt." (p. 96.)

At the time the *Eckstein* case was decided, the first section of the Minnesota statute of wills was broader than ours. It read:

"Any person of full age and sound mind may dispose by will of all or any part of his property *subject to the payment of his debts.* . . ." (Gen. Stat. [Minn.] 1894, § 4423.)

Ours reads, "subject nevertheless to the rights of the creditors."

In the later case of *Larson v. Curran*, supra, it was said:

"That the homestead of the decedent is not, after his death, occupied as a homestead by a member of his family entitled to occupy it as such, does not affect its character as being exempt from liability for the decedent's debts." (Syl. ¶ 5.)

It was further said in the opinion:

"As stated by appellant, the only question on this appeal is whether, under the will of decedent, the property occupied by him in his lifetime as a homestead passed to respondent free from the debts of decedent. This is a question of the intention of the testator as expressed in his will. That he had the right to give up his homestead to his creditors, there can be no doubt. But he had the right to devise the homestead,

and the devisee would take it free from the claims of his creditors. . . .  
*Eckstein v. Radl*, 72 Minn. 95. . . ."

"It is probably correct that an intention to devise the homestead will not be presumed when the law forbids a disposition thereof to which the surviving spouse has not assented in writing, or when there are children to whom it would descend in the absence of a devise. But when there is no surviving spouse, and no surviving children, or issue of deceased children, there is no reason to adopt a strained construction of the will in order to arrive at a conclusion that the homestead is not devised." (pp. 106, 107.)

The advancing policy of modern courts in construing the rights of the owner of a homestead was thus referred to in the opinion:

"The history of the constitutional and statutory provisions in this state in regard to the extent and character of the homestead exemption shows a steadily advancing policy in favor of the debtor, his family, and his grantee or devisee. . . . The whole trend of legislation on the subject of the descent of the homestead free from debts is indicative of a policy that creditors of the deceased shall have no recourse to the homestead, unless the debtor leaves no spouse or children, and either makes no devise thereof, or clearly indicates an intention to make a devise thereof subject to the claims of his creditors. The general rule is that only property of the decedent that was unexempt in his lifetime is after his death subject to his debts, . . . whether it precedes or follows in the will a devise of the exempt property, does not have the effect of charging the homestead with the payment of debts. . . . The case of *Cross v. Benson*, previously cited, is strongly in point, and not distinguishable from the case at bar. . . . The fact that in *Cross v. Benson* there was a wife and children to whom the homestead would have descended in the absence of a will is not sufficient to distinguish that case from this in principle, or to detract from its authority." (pp. 109, 110.)

In Wisconsin the homestead may be devised. (*Johnson v. Harrison*, Adm'r, 41 Wis. 381; *Albright v. Albright*, 70 Wis. 528; *Whitmore and Another v. Hay*, 85 Wis. 240.)

In *Myers' Guardian v. Myers* Adm'r, 89 Ky. 442, it was held that a testator may will his homestead and invest the devisee, though such devisee may be his wife or child, with the title the same as he could do by deed, and that the property would not be subject to his debts. This was followed and approved in *Pendergest, &c., v. Heekin, &c.*, 94 Ky. 384. The court of appeals of Kentucky, in *Schonbachler v. Schonbachler*, 22 Ky. Law Rep. 314, 317, 57 S. W. 232, 234, an opinion following the other cases, said:

"And we see no reason why he may not do practically the same thing

by will, because his creditors are prejudiced in one state of case no more than the other."

*Cross v. Benson* has been cited and approved in more than a dozen instances in our own decisions; and it furnished the basis for the decision in *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, in which the case of *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, was overruled. In that case Mrs. Weaver elected to take under the will of her husband devising a life interest in the homestead to her, and it was held, following the doctrine of *Cross v. Benson*, that she held the property exempt against her own creditors, as well as against the creditors of her husband's estate, and in the opinion it was said, "where the property is sought to be taken to satisfy her debt, she must be deemed to be herself the owner." The opinion commented upon the fact that the constitution does not in terms declare that the homestead exemption shall survive the dissolution of the family, but it was held that the policy of the homestead law justified the court in giving that construction to the constitutional provision.

Our homestead law has been construed as giving to the owner the right to deal with it as exempt property, something to which the eye of the creditor, that is, the general creditor, "need never turn." The owner may sell and dispose of the homestead; he may make a gift of it to another, and the one to whom the title is given, or who becomes the purchaser, takes it free from the claims of the general creditors. The constitution does not in express terms give the owner the right to sell and convey it free from the claims of general creditors; neither does it in terms declare that the exemption shall survive the dissolution of the family, but by the aid of a liberal interpretation we have held that these rights are as firmly embedded in the provision as though they had been expressly declared. Moreover, why should it be held that the proviso in section 1 of the statute of wills, authorizing an owner of real estate to devise it to another "subject nevertheless to the rights of creditors," was intended to restrict the right of the owner of a homestead in devising it, and to save the rights of general creditors? It is certainly as fair an inference from the language used, that the intention was to make merely a general proviso saving whatever rights creditors might have

to look to the homestead. The constitution had already put creditors into two classes with respect to the homestead and declared that only those having mortgage liens or liens for purchase money or improvements have the right to look to the homestead, and had made no provision that the general creditor could do so, and the court has declared that they need never look in that direction. When the statute of wills was enacted the question as to just what the rights of general creditors in respect to the homestead are was something quite uncertain and as yet undetermined. It has required numerous decisions, and we are still endeavoring to determine the extent of their rights. It seems obvious that it requires no strained construction of the language of the statute to say that it was not the intention to give to the creditor something denied him by the constitution. As already observed, the expression is not as broad in effect as the language used in the Minnesota statute of wills, which read, "subject to the payment of his debts," and yet the supreme court of Minnesota held, upon the authority of their own decisions and the doctrine of *Cross v. Benson*, supra, that the devisee takes the property free from the claims of creditors.

The situation of the plaintiff and other general creditors in the present case is in no respect different from what it would have been if the owners of this real estate a few minutes before their death occurred had made a deed conveying the property to the devisees. Their creditors are prejudiced in one situation no more than in the other, in fact, they are not wronged in either, because they never had any right to look to this property for the payment of their debts.

One of the anomalous effects of the decision in the present case appears from a consideration of our decisions holding deeds, under certain conditions, not testamentary in character. Under these decisions Willis Edson and his wife might have conveyed the homestead to their children with a condition that the deed should not take effect until the death of both grantors; and had their occupancy of the homestead continued until their death the property would have passed to the grantees free from claims of the creditors. All that would have been necessary was for the grantors to hand the deed to a third party with instructions to deliver it at their death



to the grantees. (*Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690.) And this would be true, even though the grantees were not aware that the deed had been executed. (*Gideon v. Gideon*, 99 Kan. 332, 161 Pac. 595.) Does it not seem like giving force to a mere quibble of words and losing sight of the substance of things to say that we are bound by the comment in the Comstock case respecting the different manner in which title to real estate passes under a will and under a deed; language which we have seen was not necessary to the decision?

There was no hiatus, no space of time, of which courts or the law can take any cognizance, and during which the lien of the judgment of the plaintiff could attach to the property. It was occupied as a homestead until the death of the last of the two testators. The moment the breath left her body the title passed by the will to the devisees. Occupancy as a homestead warded off the lien until death occurred, and then the title had passed. As said in the opinion in *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569, "At the death of the owner of real estate the title must go somewhere, and we know of no law which prevents the owner from saying by will where it shall go." (p. 272.) In that case the only question was whether a husband can devise by will the other half interest in his homestead. It was held that he could.

This court has established the precedent that in construing the homestead law the policy of giving it a liberal construction is of paramount importance to the doctrine of *stare decisis*. In *Weaver v. Bank*, supra, Mr. Justice Mason, speaking for the court, used this language:

"The court is of course always reluctant to treat as still open a question which it has once definitely passed upon. But in matters involving the interpretation of the constitution it is usual and proper to give less force to the doctrine of *stare decisis* than in other cases." (p. 544.)

The majority opinion, employing what seems to me a narrow rather than a liberal interpretation, gives to the homestead provision a meaning which deprives the homestead owner of a valuable privilege that has been declared to be included within the general constitutional guaranty of the right of property, which "carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty." (6 R. C. L. § 243, and cases cited.)

The saying that "constitutions march," like the statement that the sun moves, is incorrect. Speaking in strictness, a constitution until amended as provided by its terms remains what it was originally. The understanding of the full scope and effect of its general provisions is often a matter of growth and development, and it is the conception of what its true meaning is that may be said to march. The constitution speaks in general language, and avoids detail; it is merely the general framework upon which rest all the rights and all the privileges it guarantees, as well as all the duties and all the obligations imposed by it. In ascertaining the scope and effect of the constitution the court may call to its aid its knowledge of modern social conditions and is not restricted to the tallow candle in use at the time the instrument was adopted. Until repealed or amended by the legislature, statutes stand immovable; constitutions march, aided by judicial interpretation necessarily employed to give full force and effect to the rights and privileges guaranteed by their general terms. Take as a concrete example the constitutional provision for establishing the district court (Art. 3, § 5) which provides that in each judicial district "there shall be elected . . . a district judge." It never occurred to the framers of the constitution that the time might come when the population of a district or of a single county would increase to such an extent as to require more than one judge of the court to transact the business. A literal and strict construction of the language of the constitution (insisted upon by many able members of the legal profession), would have made a constitutional amendment necessary to meet the changed conditions and necessities. But, giving a liberal and broad construction to the constitution in order to carry into effect its general purpose, the court had no difficulty in deciding that the legislature might provide for a district court in a single county which should consist of a number of divisions, each presided over by a district judge, and that each of the several judges should be "a judge of the district court." (*State v. Hutchings*, 79 Kan. 191, 98 Pac. 797.) A still better concrete example may be found in the broad and liberal construction given by the supreme court of the United States to what is known as the "commerce clause" of the federal constitution. No one would have the hardihood to contend for a

moment that when they gave to congress the power "to regulate commerce between the states," the framers of the constitution had the most remote conception of the vast extent of power granted by the language as construed in hundreds of decisions of the federal supreme court.

In adopting the homestead provision, the framers of our constitution never got beyond the idea of preserving to the head of the family a refuge from the assaults of general creditors, while the family occupied the premises with him. In interpreting the homestead provision the court, however, has given it a broad and liberal construction in order to carry into effect the general purpose of the framers, and has extended the right to the widow and to the members of the family after the death of the owner. The right has thus been extended by a gradual process which has been brought about as the net result of judicial interpretation in cases involving many different situations and conditions. In *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107, it was held that a minor child who was the only heir of his widower father, and living with him on a homestead, was entitled to claim the benefit of the homestead after the father's death, although living elsewhere with his guardian. The progress or march of the constitution halted at times. In *Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, the court gave a narrow construction to the homestead clause, and held that the homestead right would not persist for the benefit of an unmarried daughter of adult years who resided on a homestead with her father until his death, he dying intestate and leaving her his sole heir and she continuing to occupy the premises as her home. The land was held subject to sale for the debts of the father. The uncertainty as to the extent of the homestead right prevailing at the time the decision was written is apparent in the following statement of Mr. Justice W. R. Smith in the opinion:

"We are not called upon to decide, nor do we find that the question has been passed upon by this court, that where the head of a family residing on a homestead loses his wife and children, the right once fixed by law to hold the homestead as against creditors is divested by such circumstance." (p. 521.)

The court was called upon in *Cross v. Benson* to consider the homestead guaranty as affecting a situation to some extent unique, and the decision cast additional light upon the meaning

of the constitution. It marks another stage in the progress of the constitution, or rather in the conception of what the homestead provision means. Later, because the court was satisfied with the decision, it was made the basis for an express declaration in *Weaver v. Bank*, supra, overruling *Ellinger v. Thomas*, and in my opinion it went far beyond the decision in *Batthey v. Barker*, supra, and in effect has overruled the doctrine of that case.

It requires the exercise of but a modicum of the liberality employed by the highest court in the land in the interpretation of the commerce clause of the federal constitution, for this court to hold that the valuable right of the owner of a homestead to dispose of it in any of the recognized methods of conveying real estate, was included in the constitutional provision, since the only exception to his right to convey does not include a prohibition against disposing of it by will; and, following the logic of *Cross v. Benson*, and the force and effect given to it by the Minnesota court, to say that since the right to dispose of the homestead by devise or will was not taken from the owner by the constitution, the legislature has no power to do so, if that were held to be the intention of the provision of section 1 of the statute of wills.

As regards the intention of the legislature, I think the majority opinion not only places too much emphasis upon the proviso in section 1 of our statute of wills, but assumes that it was intended specially to limit the transfer of the homestead by will, although the homestead is not specifically mentioned. Only eighteen states of the Union have in their statute of wills a provision declaring that property devised by will shall be subject in some manner to the debts of the testator. Among the thirty states which have no such provision are those comprising the thirteen original colonies and the states created from their territory. Notwithstanding the absence of such a provision in thirty states, it cannot be doubted that the law is the same in all the forty-eight states, and that in all of them property devised by will is subject generally to the rights of creditors. It amounts to this: the law is the same whether the statute of wills contains such a provision or not. Things that are equal to the same thing are equal to each other. The language of the proviso in our statute of wills adds nothing to the force or effect of the statute nor to the rights of creditors.

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Walker v. Faelber.

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Without such a provision in the statute the owner of property conveyed it by will, subject generally to his debts; the statute makes no reference to a homestead, and it seems obvious that the language was not intended and should not be construed to deprive the owner of a homestead of the right to convey or dispose of it by will just as he could have conveyed it by deed. In the words of the supreme court of Kentucky, in *Myers' Guardian v. Myers' Adm'r*, supra:

"And it would, therefore, seem no more injury to creditors, nor in contravention of the purpose and reason of the homestead law, for the debtor to pass the title by will than by deed; for if, as has been held, he can by deed, and for merely love and affection, convey the remainder interest to his children, reserving a life estate to himself, we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of case no more than the other."

After the fullest consideration of the importance of the question involved, I have reached the conclusion that the devisees under the will take the land free from the claims of the general creditors.

I am authorized to say that Mr. Chief Justice JOHNSTON and Mr. Justice BURCH join in this dissent.

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No. 21,371.

THOMAS WALKER, *Appellant*, v. EDWARD FAELBER, *Appellee*.

SYLLABUS BY THE COURT.

1. **MOTORCYCLE—Operation on Public Highway—Construction of Statute.** Chapter 65 of the Laws of 1913, making it unlawful for any person to operate a motorcycle on a public highway outside of a town or village at a greater rate of speed than twenty-five miles per hour, was intended solely for the protection of others using such highway.
2. **SAME—Motorcycle Exceeding Speed Limit—Frightening Team in Adjacent Field—No Liability under Statute.** The defendant operated a motorcycle along a public highway at a rate of forty miles per hour. In a field adjacent to the highway the plaintiff's team attached to a binder became frightened at the noise of the exhaust on the defendant's machine, ran away, and injured the plaintiff. In an action to recover for the injuries on the ground that the defendant was liable under the statute, *held*, the court rightly sustained a demurrer to the evidence.

Appeal from Saline district court; DALLAS GROVER, judge.  
Opinion filed March 9, 1918. Affirmed.

*G. A. Spencer*, and *A. R. Buzick, jr.*, both of Salina, for the appellant.

*Z. C. Millikin*, of Salina, for the appellee.

The opinion of the court was delivered by

PORTER, J.: This is an appeal from a judgment sustaining a demurrer to the plaintiff's evidence.

The plaintiff was engaged in harvesting grain in a field adjoining a public highway, and was using a binder drawn by four horses. The defendant passed along the public highway on a motorcycle, moving at a rate of forty miles an hour. The plaintiff claimed that his horses became frightened from the noise of the exhaust or muffler on the motorcycle and ran away, breaking the binder to which they were hitched, injuring one of the horses so that it died, and throwing the plaintiff from the seat of the binder, resulting in his injuries. It was the plaintiff's contention that the defendant was wantonly reckless and negligent in traveling at such a rate of speed on the highway with the exhaust of the motorcycle open. The action was sought to be maintained on the theory that plaintiff was entitled to recover by reason of the provisions of section 7 of chapter 65 of the Laws of 1913, which reads in part as follows:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the conditions of the road, nor at a rate of speed such as to endanger the life or limb of any person; provided that a rate of speed in excess of twenty-five miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another."

The statute has been amended and the limit of speed outside towns and villages fixed at forty miles per hour (Laws 1917, ch. 74, § 5), but the act of 1913 was in force and effect at the time of plaintiff's injury. The plaintiff testified that he had not heard any noise except that made by the binder, but saw something pass on the highway like a streak, when the horses gave a jump, threw up their heads, and started to run. The evidence showed that the horses attached to another binder four or five

rods in front of the one plaintiff was operating were not affected by the noise of the motorcycle.

The defendant's contention, which was upheld by the trial court, is that the statute was enacted solely for the protection of persons using the public highways. The title of the act shows that it relates to automobiles and other motor vehicles "regulating their use and operation upon the streets and highways." Section 7 forbids any person to "operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the conditions of the road," or "at a rate of speed such as to endanger the life or limb of any person." In another part of the same section, defining the rate of speed at which such vehicles shall be operated within any city or village, it is declared that "no motor vehicle shall be operated at a speed greater than twelve miles an hour or at a rate of speed greater than is reasonable and proper, and having regard for the traffic and use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person." In this section, also, the person operating a motor vehicle is required to reduce the speed to a rate not exceeding eight miles an hour upon approaching railroad crossings and intersections of highways, or a bridge or a sharp curve or a steep descent, or upon approaching "another vehicle or an animal or person outside of any village or city," and there the rate of speed is limited to eight miles an hour until the person is "entirely past such intersection, bridge, curve, descent, vehicle, animal or person." Section 8 of the act makes it the duty of the person operating such motor vehicle, "at request or on signal by putting up the hand, from a person riding or driving a restive horse or other draught or domestic animal," to bring such motor vehicle "immediately to a stop," and "if traveling in the opposite direction to "remain stationary so long as may be reasonable to allow such horse or animal to pass."

In section 9 the act requires the motor vehicle to be equipped with good and sufficient brakes and with a suitable bell, horn or other signal, and to exhibit "during the period from one-half hour after sunset to one-half hour before sunrise, one or more lamps, showing white lights visible within a reasonable

distance from the direction toward which such vehicle is proceeding, and a red light visible from the reverse direction."

We think it is obvious that the trial court's construction of the statute is the correct one. The legislative purpose was to protect a distinct class of persons, that is, users of public highways. The safety of a person in a field adjoining a public highway was not within the contemplation of the legislature. The requirement of a bell or horn and the use of signals and of lamps in front and in the rear, and the giving of signals from the direction towards which such vehicle is proceeding, and a different signal visible from the rear, could only have been intended for the protection of persons traveling on the highway. The duties imposed by law upon the driver of a motorcycle require him to keep his eyes upon the road and to look ahead for the purpose of protecting other persons using the public highway from probable injury resulting from fast driving or other negligence. Since the statute imposed upon defendant no duty to the plaintiff, the evidence failed to show negligence. It is only where the defendant wrongfully fails to perform some duty owed to the plaintiff that a cause of action based upon negligence can exist. (*Tawney v. Railway Co.*, 84 Kan. 354, 114 Pac. 223; *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 558.) Moreover, there was no evidence tending to show that a motorcycle running at forty miles an hour would make any more noise, or be any more likely to frighten a horse in an adjoining field, than one running at twenty-five miles an hour, which was the rate of speed allowed by the statute. Counsel for the plaintiff admit they have not been able to find any case or precedent directly in point, and we have found none, but on the general principles upon which actions for negligence are based, we are satisfied that the plaintiff cannot recover.

The judgment is affirmed.



No. 21,373.

MARY E. SHARRER, *Appellee*, v. THE CAPITOL LIFE INSURANCE COMPANY, OF COLORADO, *Appellant*.

## SYLLABUS BY THE COURT.

1. **LIFE INSURANCE**—*Physical Appearance of Applicant—Testimony of Neighbors.* Testimony of neighbors as to physical appearance of the insured was properly received touching his good faith in making the statements contained in the application.
2. **SAME**—*Statements in Application—Representations Not Warranties.* The policy provided that the statements made by the insured should, in the absence of fraud, be deemed representations, and not warranties. *Held*, that good faith in making such statements was sufficient, although they may have been incorrect in fact.
3. **SAME**—*Verdict—Instructions.* The evidence supported the verdict, and there was no error in the giving or refusing of instructions.

Appeal from Saline district court; DALLAS GROVER, judge.  
Opinion filed March 9, 1918. Affirmed.

C. W. Burch, B. I. Litowich, LaRue Royce, all of Salina, and William E. Hutton, of Denver, Colo., for the appellant.

Z. C. Millikin, of Salina, for the appellee.

The opinion of the court was delivered by

WEST, J.: The defendant appeals from a judgment on a life insurance policy, claiming that the answers of the applicant touching his health relieved the company from liability; that certain testimony was improperly admitted; that certain findings of fact should have been set aside; and that the court erred in charging the jury.

The answers in the application complained of are that he had never had any disease of the stomach, and that to the question, "How often during the past five years did you consult a physician?" the answer was "No." It seems that the applicant had consulted certain doctors about some digestive disturbance, and had had his stomach washed out and received some treatments, and that some months after the policy was issued the trouble developed into a cancer of the stomach or esophagus, from which he died. The agent testified that he

took the examination blank on September 27, 1915, and the policy was issued three days later; that he had known the deceased some two years; that he went to his house to solicit his two boys for life insurance and spoke to the father about insuring him, remaining at the house two or two and a half hours. Later, he called the deceased to come to his office and finally got his application for life insurance, being paid one year's premium in advance by check. He sent the applicant to Dr. Moses, the examiner, and when the policy came the agent went out as quickly as he could and delivered it at the applicant's home and stayed there until after dinner. He did not observe anything unusual about the applicant's eating; he seemed to eat like the rest of the people—took the same kind of food as near as the agent could tell, and was apparently in good health.

The examiner testified that he did all the writing on the application, except the signature.

"Q. After you had written down the answers in this blank, did you read it over to him? A. No, sir.

"Q. You just passed it to him and asked him to sign it? A. I just passed it to him and says: 'This is what you are to sign,' pointing the place where he is to sign.

"Q. And he signed? A. He signed.

"Q. Yes, and you say to all external appearances, at least, or as far as your examination disclosed, he was a healthy man? A. He was a healthy man."

The jury found that the deceased consulted one physician June 28, and July 26, 1915, another about August 25 and September 4, and the former about September 27, but that on September 27, and for two months before, he enjoyed good health, and that two months prior to that date he had no sickness.

"13. Was the insured in sound health and insurable condition at the time of the delivery of the policy of insurance sued upon in this action? A. Yes."

Witnesses were permitted to testify that they had seen the deceased at various times during the summer and fall, one as late as December, and that he looked and acted as usual. This simply corresponds with what the examining physician thought at the time he wrote in the answers to the questions,

and it was competent touching the good faith of the deceased, for if his appearance was such that his neighbors and acquaintances, as well as the examining physician, thought him in usual good health, this would tend to show that the applicant had no reason to believe that he had been or was soon to be stricken with a fatal malady.

It is argued that the truth and not the good faith of the answers is the scale-tipping thing; but it is stated in the plaintiff's brief, and not disputed, that the policy contained the clause that "All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties." The rule in such cases is that good faith is sufficient. (*Mouler v. American Life Ins. Co.*, 111 U. S. 335; *Insurance Co. v. Woods*, 54 Kan. 663, 39 Pac. 189. See, also, *Farragher v. Knights & Ladies*, 98 Kan. 601, 159 Pac. 3, and *Diehl et al. v. Mut. Life Ins. Co.*, 176 Ill. App. 462.) The recent decision in *American Bankers' Ins. Co. v. Hopkins*, by the supreme court of Oklahoma, 169 Pac. 489, is very much in point.

Section 5290 of the General Statutes of 1915 provides that—

"No misrepresentation . . . shall be deemed material . . . unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable."

The answer alleged, not only that the applicant when insured was and for many months had been afflicted with cancer of the stomach, but also that all of the representations covering this matter "were false and known to be false by the said David N. Sharrer and were falsely and fraudulently made to the defendant by the said David N. Sharrer for the purpose of inducing the issuance to him" of the policy. The day the examination was made the deceased had had his stomach washed out, and this was repeated two days later, the doctor giving him a prescription. But not until November 1st was an X-ray picture taken, and this revealed what the doctor termed two notches about as big as a half dime. After the death in the following March a post-mortem examination convinced the same physician that cancer caused the death. Two other doctors examined him on September 4 and discussed a case of malignancy or cancerous stomach, but did not conclude

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that it was such. Two of the attending physicians during his last sickness testified that a case of cancer might develop and produce death within three months, and that they were unable to say that any diseased condition existed as early as September. One of them stated that the condition found at the post mortem was not necessarily inconsistent with good health the previous September.

From the foregoing, it appears that the jury had fair grounds for finding that the claims of existing cancer and fraudulent statements were not sustained.

The instructions gave the jury correct rules to guide their deliberations.

Mention is made of a previous rheumatic ailment, but this does not appear to have returned, or to have been a causal element in the case.

The judgment is affirmed.

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No. 21,379

ALFRED SCOTT, by his next friend, HENRY SCOTT, *Appellee*, v.  
THE KANSAS STATE FAIR ASSOCIATION, *Appellant*, et al.

## SYLLABUS BY THE COURT.

1. AUTOMOBILE RACES—*Injury to Boy Ten Years Old—Contributory Negligence—Question for Jury.* Whether the plaintiff, a boy ten years old, of average intelligence, who, while attending automobile races, occupies a dangerous place after repeated warnings of the danger, is guilty of such contributory negligence as will prevent his recovering damages for the injuries he sustained by being run over by one of the racing automobiles, is a question of fact to be determined by the jury.
2. JOINT TORT-FEASORS—*Effect of Compromise with a Part of Them.* On an oral compromise with several joint tort-feasors, a reservation of the right to proceed against the other joint tort-feasors may be made orally.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed March 9, 1918. Affirmed.

*Edwin D. McKeever*, of Topeka, for the appellant.

*Otis Hungate*, and *Frank G. Drenning*, both of Topeka, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The Kansas State Fair Association appeals from a judgment rendered against it for negligently injuring Alfred Scott.

1. The association urges that the plaintiff was guilty of contributory negligence, and, for that reason, no judgment could be properly rendered in his favor. This question was presented to the trial court in several ways.

On September 17, 1915, the association was holding a free state fair on the Kansas state fair grounds at Topeka, and had advertised that automobile races would occur on that day. The plaintiff, then a boy ten years old, with a couple of companions attended the fair and the automobile races. These races occurred on a half-mile race track, which had been built and was ordinarily used for horse racing. The plaintiff and his companions sat on some boxes near the curve at one end of the track. A large number of other people occupied positions near the plaintiff. Around the track a post and woven-wire fence had been built; the plaintiff was near this fence. The association, through its officers and employees, gave repeated warnings to all who were near the plaintiff that the place occupied by them was dangerous, and that the racing automobiles were liable to leave the track, go through the fence, and kill and injure some of those who were standing near. The plaintiff heard these warnings, but he remained at or near the place then occupied by him. One of the racing automobiles left the track, went through the fence, and injured the plaintiff. The plaintiff lived in the city of Topeka. He was a boy of average intelligence, and was acquainted with automobiles and with the danger encountered by getting in front of one.

The association argues that because of the intelligence of Alfred Scott, because of the dangerous place occupied by him, and because of his remaining in that place after repeated warnings, he was guilty of such contributory negligence as prevents his recovering damages for the injuries he sustained.

Contributory negligence, like negligence, is ordinarily a question for the jury. Under the circumstances disclosed by the evidence abstracted, the question of the contributory neg-

ligence of the plaintiff was a question to be determined by the jury as a question of fact. The circumstances did not disclose that the plaintiff was guilty, as a matter of law, of such contributory negligence as would prevent his recovery. In *Ratcliffe v. Speith*, 95 Kan. 823, 149 Pac. 740, this court said:

"Whether . . . the plaintiff, who was over thirteen years old and who started across the street without looking for or observing the approach of the automobile, which was coming at a moderate rate of speed, was guilty of contributory negligence, were questions for the determination of a jury." (Syl. ¶ 2.)

A like conclusion was reached in *Routh v. Weakley*, 97 Kan. 74, 154 Pac. 218. (See, also, *K. P. & Rly. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Bess v. Railway Co.*, 62 Kan. 299, 62 Pac. 996; *Coy v. Railway Co.*, 74 Kan. 853, 86 Pac. 468; Note to "Contributory Negligence of Children," L. R. A. 1917F, pp. 10, 66.)

2. Another matter urged is that the plaintiff settled with the other defendants in this action, and that he cannot now recover against the fair association. The action was brought against the Kansas State Fair Association, H. L. Kirkpatrick, S. E. Lux, and W. W. Webb. A compromise was affected with S. E. Lux and W. W. Webb. Under that compromise they paid to the plaintiff \$2,666.67, and were released from further liability. However, the plaintiff made a distinct reservation to sue the Kansas State Fair Association, notwithstanding the settlement with Lux and Webb. Both the settlement and the reservation were oral. The argument is that such a reservation should be reduced to writing. That argument is not good. There is no law which requires that such a reservation shall be in writing. An oral reservation is as good as a written one. This court has held that such a reservation is good, and that it preserves the right of the injured party to proceed against the joint tort-feasor with whom no settlement has been made. (*Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784; *City of Topeka v. Brooks*, 99 Kan. 643, 164 Pac. 285; *Feighley v. Milling Co.*, 100 Kan. 430, 165 Pac. 276.)

No question is presented concerning the negligence of the association.

The judgment is affirmed.

No. 21,380.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF  
DOUGLAS, *Appellant*, v. THE CITY OF LAWRENCE, *Appellee*.

## SYLLABUS BY THE COURT.

1. **TOWN SITE—Levee and Streets Dedicated—Fee Vested in County in Trust.** When the founders of a city or town execute, file, and record the plat of the property devoted by them to town-site purposes, the fee title of the levees, streets, alleys, parks, and the like vests in the county forever, in trust for the public, by operation of law.
2. **SAME—Control of Levees, and Streets Vested in City.** The lawful possession, dominion, and control of all levees, streets, and the like, dedicated to the public by the founders of a town site, are vested in the city by operation of law.
3. **SAME—Control of Levees and Streets—Cannot be Divested by City.** A city cannot, by executing a deed of conveyance to a part of a public levee, disable itself of its public municipal power nor relinquish its public municipal duty to control the property for the public good.
4. **SAME—Control of Levees and Streets—Nonuse—Laches—Adverse Possession.** Those rights, duties, and privileges conferred and imposed upon a municipal corporation exclusively for the public benefit cannot ordinarily be lost through nonuse, laches, estoppel, or adverse possession, and statutes of limitation are not ordinarily applicable thereto.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed March 9, 1918. Affirmed.

*J. S. Amick*, of Lawrence, for the appellant.

*Thomas Harley*, and *J. Willard Ward*, both of Lawrence, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This was an action by the board of county commissioners of Douglas county, against the city of Lawrence, to quiet its title to a small tract of land on the bank of the Kansas river in the city of Lawrence. The county's title sought to be quieted was based on a deed from the city to the county executed in 1860. The defendant city prevailed, on the following facts and conclusions of law as found and determined by the trial court:

"1. The tract of land in dispute in this case is clearly marked on the plat attached to the pleadings. It is bounded on the north by the Kan-

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sas river, on the west by the west line of Vermont street produced; on the south by Pinckney street and on the east by the west line of Massachusetts street produced. The ground forms a portion of the original town site of Lawrence.

"2. The original town site company filed its plat in the late fifties and on that plat this land was marked 'Levee.' This plat was destroyed by fire in the Quantrell raid of 1863, but another was reproduced by a competent engineer later by order of the Board of County Commissioners.

"3. In June, 1860, the City of Lawrence by its proper officers executed and delivered to Douglas county a warranty deed for the land in question and a few years later the county erected a jail thereon and used it for jail purposes until some five or six years ago when it erected a new jail on another site.

"4. In 1866 certain persons representing themselves to be 'Trustees of the Lawrence Town Company' executed a deed of conveyance to the city of Lawrence for this property.

"5. The county has leased this property to various persons from time to time.

"7. If the city through its mayor and councilmen had the authority so to do it has parted with all of its title to the real estate in question to the county, both by actual transfer and by permitting the county to use the same openly, notoriously, and adversely for more than fifteen years."

## CONCLUSIONS OF LAW.

"1. When the plat of the original town site was filed it vested the title of the real estate in question in the county for the uses and purposes therein designated. The use and control, however, was always in the city.

"2. The city was powerless to part with the title to this real estate or to its right to possess and use the same for the purpose for which it was dedicated.

"3. The fee of the real estate in question is still in the county, not by virtue of any conveyance, or any adverse title, but it holds the original title vested in it by the filing of the plat; the possession and use of it, however, is in the city."

## Plaintiff appeals.

The county of Douglas has an unimpeachable fee title to the land, as trustee for the benefit of the public and particularly for that portion of the public represented by the city of Lawrence and its inhabitants, such title in trust being based on the dedication of the land to public uses by the original incorporators of the city of Lawrence, as evidenced by the plat filed by them at the time the city was founded, about 1854 or 1855. (Kansas Stat. [Territorial] 1859, ch. 24; Gen. Stat. 1915, §§ 6797-6808; *Comm'rs of Franklin Co. v. Lathrop*, 9 Kan.



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453; *A. & N. Rld. Co. v. Garside*, 10 Kan. 552, syl. ¶ 1; *Wood v. National Water Works Co.*, 33 Kan. 590, 7 Pac. 233; *A. & N. Rld. Co. v. Manley*, 42 Kan. 577, 586, 22 Pac. 567; *A. T. & S. F. Rld. Co. v. Luening*, 52 Kan. 732, 35 Pac. 801.)

In the latter case the court said:

"In this state, the fee of all real estate, when dedicated to public use by the proprietors of any town or city, vests absolutely in the county wherein such real estate lies, and the county forever afterward holds the property in trust for such use. The county holds the property as a mere agent of the public, and in trust for the public use. But the city has the control over it as another agent of the public. (*Railroad Co. v. Garside*, 10 Kan. 552; *Showalter v. Railway Co.*, 49 id. 421.)" (p. 735.)

In the *Wood* case, *supra*, part of the syllabus reads:

"Where a proprietor laying off any city or town, or an addition to any city or town, . . . makes out a map or plat thereof, and reserves for public uses streets and alleys, and acknowledges, certifies, files and records the same with the register of deeds of the county in which such city or town, or addition, is situate, the fee of the streets and alleys dedicated to public use vests absolutely in the county wherein such real estate lies, and the county forever afterward holds the property in trust for such use; but the city has control over it, as another agent of the public; and such streets and alleys, under the direction and control of the public authorities, are subject to be appropriated to all the uses to which the streets of a city are usually devoted, as the wants or conveniences of the people may render necessary or important." (p. 590.)

The evidence and the inferences which may properly be derived therefrom justify the trial court's second finding of fact. The deed of the original grantor of the town-site company intended that the levees, streets, parks, etc., should pass to the public. That the grantor directed that his trustees should convey the levees, etc., by deed to the town corporation is unimportant. The statute designated the proper mode of conveying the property for the uses intended—by the execution, filing and recording of the plat—and that mode was complied with. The act of 1859, chapter 24, was intended, so far as applicable, to apply to lands theretofore platted for town sites as well as to those which should be platted thereafter. (§§ 11, 12.)

"A strip of land lying along the margin of a navigable stream was included in the plat of a city and dedicated to the public by the use of the word 'levee' written thereon. Several streets opened upon this tract and many lots had no other means of ingress and egress except over and along it. *Held*, that its dedication included its use as a street as well as

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a landing-place for boats." (*McAlpine v. Railway Co.*, 68 Kan. 207, syl. ¶ 1, 75 Pac. 73.)

It seems, therefore, that when the original plat of the city of Lawrence, covering the levee in question, was filed and recorded, the prior title holders parted with all their interest in the property in dispute, and the fee title in trust passed by operation of law to Douglas county; and the beneficial use of the land passed to the general public; and the control of the land, for the benefit of the public, passed to the city of Lawrence. Consequently, the deed of 1860 from the city of Lawrence to the county of Douglas conveyed nothing that the county did not then already possess—the fee title to the property—and the deed from the city to the county executed in 1860 was void because the city had no fee title to convey, and it could not by such conveyance disable itself of its public municipal power nor relinquish its public municipal duty to control the property for the public good.

The deed of 1866 from the "Trustees of the Lawrence Town Company" to the city was of no force, as the dedication of the property to public uses several years before had conveyed all that the grantors had power to convey. And the doctrine of the effect of after-acquired title is not applicable.

A levee in a city, dedicated to public use, does not substantially differ from a street or public park. In *Webb v. Demopolis*, 95 Ala. 116, it was held:

"A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstructions." (Syl. ¶ 4.)

While a municipal corporation may part with its private, proprietary rights through conveyances, or lose them through prescription, adverse possession, or by statutes of limitation, yet the great weight of authority is that those rights, duties and privileges which are conferred or imposed upon a municipal corporation exclusively for the public benefit are not ordinarily lost through nonuse, laches, estoppel, or adverse possession, nor are statutes of limitation applicable thereto. (*Simplot v. Chicago, M. & St. P. Ry. Co.*, 16 Fed. 350, syl. ¶ 2;

*San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *Lee et al. v. Town of Mound Station*, 118 Ill. 304; *Cheek v. City of Aurora et al.*, 92 Ind. 107; *Wolfe et al. v. The Town of Sullivan*, 133 Ind. 331; *The City of Waterloo v. The Union Mill Co.*, 72 Iowa, 437; *Taraldson v. Town of Lime Springs*, 92 Iowa, 187; *Witherspoon v. Meridian*, 69 Miss. 288; *Territory v. Deegan*, 3 Mont. (Ty.) 82; *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 608; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108; *Commonwealth v. Moorehead*, 118 Pa. St. 344; *Sims v. Chattanooga*, 70 Tenn. 694; *Yates v. Town of Warrenton*, 84 Va. 337; *Ralston v. Town of Weston*, 46 W. Va. 544; *Childs v. Nelson*, 69 Wis. 125.)

There is still another, somewhat different, legal and equitable principle which bars the claims of Douglas county as sought to be maintained in this action. The county became the trustee holder of the title in 1855, or thereabouts, by operation of law. The county was thereby charged in law with a trustee's duties—to hold the title inviolably for the benefit of its *cestui que trust*, who under this trust were the general public. The county has always been charged in law with notice of the rights of the public. It could acquire no interest in the property inconsistent with its duty as trustee. It was charged in law with notice that the city could not abdicate its public municipal power nor escape its public duty to control the property for the benefit of the *cestui que trust*—the people in general, and the inhabitants of Lawrence in particular.

The judgment of the district court was correct, and it is affirmed.

No. 21,384

VASHTI C. WAYMAN, *Appellant*, v. AUGUST SOLLER and T. C. DODD, *Appellees*.

## SYLLABUS BY THE COURT.

**JURISDICTION**—*Appeal—Amount Involved Less than \$100.* In an action for the recovery of money only, in which a party is resisting the recovery of any amount and a judgment is rendered for \$62, from which such party attempts to take an appeal, the amount in controversy as to such party is fixed by the amount of the judgment, and it being less than \$100, no appeal lies to the supreme court.

Appeal from Washington district court; JOHN C. HOGIN, judge. Opinion filed March 9, 1918. Dismissed.

*Edgar Bennett*, of Washington, for the appellant.

*J. R. Hyland*, of Washington, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: T. C. Dodd filed a claim against the estate of O. H. P. Steele and Caroline Steele, deceased, in the sum of \$103.03. It was duly exhibited to the administrator of the estate, August Soller, and on April 29, 1916, the probate court allowed the claim to the extent of \$62, and assigned it to the fifth class. On May 3, 1916, Vashti C. Wayman, daughter and heir at law of Caroline Steele, filed notice of appeal to the district court from the order of the probate court, but she did not file her appeal bond until June 10, 1916. After the case was taken to the district court Dodd filed a motion to dismiss the appeal for the reasons (1) that the heir is not the proper party to take an appeal from the probate court, and (2) that the appeal bond was not filed and approved within thirty days from the date of the judgment. The district court sustained the motion, from which order this appeal is taken.

The heir plausibly contends, somewhat in line with the rule in *Sarbach v. Deposit Co.*, 99 Kan. 29, 160 Pac. 990, that she is an interested party, and is therefore entitled to an appeal from the allowance of a claim that will reduce the residue of the estate of which she was entitled to a part. Granting,

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however, that an heir is entitled to an appeal, under the statute the steps to an effective appeal are to be taken within thirty days, which was not done in this instance. The defendants insist that the giving of bond is a prerequisite to the granting of an appeal, one equally as essential as notice and affidavit, which have been held to be indispensable, and they have cited authorities to sustain their contention, which are very persuasive. (*Spangler, Adm'r, v. Robinson*, 20 Kan. 682; *McClun v. Glasgow*, 55 Kan. 182, 40 Pac. 329; *McIntosh v. Wheeler*, 58 Kan. 324, 49 Pac. 77; *Pee v. Witt*, 100 Kan. 171, 163 Pac. 797.)

Although the questions raised for and against the right of appeal are simple, and the answers to them are obvious, it is equally obvious that as there is less than \$100 involved this court is without jurisdiction to consider or determine them. The claimant asked the probate court for an allowance of \$103.03. That court allowed \$62 of the claim. The disallowance of \$41.03 was to that extent a decision in favor of the heir, if she be an interested party, and also in favor of the administrator, who is not attempting to appeal. As to either of them \$62 is the amount in controversy, and, as nothing else is involved than the recovery of money, the case is not appealable. (Civ. Code, § 566; *Richmond v. Brummie*, 52 Kan. 247, 34 Pac. 783; *Nuhfer v. Flanagan*, 87 Kan. 420, 124 Pac. 418; *Wilson v. Fisher*, 92 Kan. 786, 142 Pac. 241.)

The appeal is therefore dismissed.

No. 21,389.

FANNIE CUSICK, *Appellee*, v. W. F. MILLER, *Appellant*.

## SYLLABUS BY THE COURT.

1. **NEGLIGENCE—Automobile Driver—Contributory Negligence of Plaintiff.** A pedestrian, arriving at a street intersection which he desires and attempts to cross, is not necessarily guilty of contributory negligence because he does not look behind him for approaching automobiles.
2. **SAME—No Reversible Error in Record.** Various assignments of error relating to evidence, instructions, special findings, and the general verdict, considered, and *held*, none of them is sufficient to warrant a reversal.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed March 9, 1918. Affirmed.

*S. C. Bloss, J. E. Torrance, and O. W. Torrance*, all of Winfield, for the appellant.

*A. M. Jackson, and A. L. Noble*, both of Winfield, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one for damages for personal injuries inflicted by the defendant, who drove his automobile over the plaintiff at a street crossing. The verdict and judgment were for the plaintiff, and the defendant appeals.

Seventh street in the city of Winfield extends east and west. It is crossed by Andrews street, which extends north and south. The plaintiff desired to go from the northeast corner to the southwest corner of the intersection. She intended to take a diagonal course, but discovered a team and wagon, followed by an automobile, entering the intersection from the west. She took a course more toward the west than toward the south. As the team and wagon came forward the automobile passed north of them and south of the plaintiff, who was only two or three feet within the north portion of the intersection. Just at this time the defendant approached from the east. Driving his automobile at a speed of twelve miles per hour, the defendant, without warning and without slackening speed, undertook to dart between the wagon and

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the plaintiff. He knocked the plaintiff down, ran over her, and seriously injured her. The plaintiff was in plain view, and the defendant could have stopped his automobile within the space of two or three feet. With the verdict, the jury returned special findings of fact, which follow:

"1. If plaintiff on approaching 7th avenue had looked to the east could she have seen the defendant's car approaching? A. Yes.

"2. What, if anything, was there to prevent plaintiff from passing straight across 7th avenue from north to south on a line with the sidewalk? A. Wagon and automobile.

"3. As defendant, Miller, approached the intersection of Andrews street with 7th street were there other vehicles in or near the crossing which partly attracted his attention and made it necessary for him to look out for them? A. Yes.

"4. After defendant saw plaintiff in the street and in a dangerous position did he use his best judgment and efforts in trying to avoid the accident? A. No.

"5. After having entered upon the street or intersection of 7th avenue and Andrews in what direction or directions did she move before she was struck by defendant's car? A. South and west.

"6. After the plaintiff stepped upon 7th avenue or the intersection of 7th avenue and Andrews and before the accident, was she delayed or her direct course obstructed by reason of the automobile and the team and wagon on the intersection? A. Yes.

"7. Did the plaintiff just before going south in her effort to cross 7th avenue look east to see if other vehicles or automobiles were coming from that direction? A. No.

"8. Was the plaintiff guilty of negligence which proximately contributed to her injury? A. No.

"9. If you find the defendant was negligent and that such negligence caused the injury complained of, state what particular act or acts, omission or omissions on the part of the defendant caused the injuries. A. Failed to sound horn, failed to put on emergency brake, and driving too fast.

"10. After the defendant discovered the position of the plaintiff in the street did he use all reasonable means within his power under the circumstances to avoid the accident? A. No."

The defendant complains of the introduction of certain evidence.

It is said the plaintiff was allowed to prove the defendant's wealth. What occurred was this: Shortly after the accident deeds of real estate from the defendant to his children were placed on record. The plaintiff desired to show the transfers as tending to establish consciousness of liability and a purpose to evade satisfaction of such liability. The defendant was

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asked a preliminary question, what property he owned at the time of the accident. He answered that he owned 640 acres of land. He was then asked what he did with the land shortly after the accident. He answered that he still owned it, and explained that the deeds which were placed on record were deeds of other land, made long before the accident. No attempt was made to prove the defendant's wealth. The evidence which the plaintiff expected to obtain would have been proper, the method of examination to obtain it was proper, and the plaintiff simply failed to prove what she desired to prove.

The defendant complains of the introduction in evidence of a letter to him from the pastor of a church, which it is argued tended to create sympathy for the plaintiff and resentment toward the defendant. On cross-examination of the defendant the following occurred:

"Q. How many times were you up to see Miss Cusick? A. I never went to see Miss Cusick.

"Q. You received a letter from Rev. Gentry? A. I did.

"Q. Never answered that letter? A. No, sir; I thought he was a meddler and did n't pay any attention.

"Q. I say, you never answered that letter? A. No, sir."

At this point counsel for the defendant objected, no ground of objection being stated, and the cross-examination closed. The subject of the cross-examination was outside the scope of the direct examination, was wholly immaterial, and the plaintiff was bound by the answers returned. The defendant, however, reopened the subject by testifying to facts justifying him in not visiting the plaintiff, because of apprehension of bodily harm. The letter, which was a friendly one, was then admitted, and the defendant was asked if he was afraid of the preacher. The court instructed the jury that the letter could be considered only as bearing on the question whether or not the defendant was afraid to visit the plaintiff. The issue of fear was raised by the defendant. He might have had the cross-examination stricken out, if he had so desired. Instead of this he chose to enlarge upon it, and must abide the result.

Complaint is made that an instruction which was requested was not given, and of instructions which were given.

The requested instruction authorized the jury to infer contributory negligence from the plaintiff's knowledge of traffic conditions usual to the place, not conditions as they actually



existed, and from her failure to look toward the east. It ran counter to instructions which were given, over objection, and which will now be considered.

The court instructed the jury on the subject of contributory negligence in terms of reasonable and ordinary care, to be determined from all the facts and circumstances. The jury were further instructed that a pedestrian about to cross a city street is not necessarily negligent in not looking and listening for approaching automobiles. The instruction was correct. It is not the law of this state that mere presence of a city street crossing cries danger to a pedestrian, however dangerous a few incorrigible automobile drivers may in fact make the public thoroughfares. (*Williams v. Benson*, 87 Kan. 421, 423, 124 Pac. 531; *Ratcliffe v. Speith*, 95 Kan. 823, 828, 149 Pac. 740.) In this connection it may be observed the defendant is quite inconsistent. He asks to be acquitted of negligence in not seeing the plaintiff, who was directly in front of him, because his attention was taken by the team and wagon and the automobile following them. He charges the plaintiff, whose attention was taken by the same objects, with negligence because she did not look backward and discover his approach.

Violation of the statute limiting the speed of automobiles on city streets and at street intersections was pleaded and proved. The court stated the terms of the statute in an instruction to the jury. It is said the court should have qualified the instruction by stating that violation of the statute must be the direct and proximate cause of injury, to authorize recovery on that ground. The qualification was contained in another instruction covering all acts of negligence charged.

Certain portions of the instructions were devoted to the doctrine of last clear chance. They need not be discussed, because the jury eliminated the subject of last clear chance from the controversy by finding the plaintiff was not negligent at all. It is contended the finding was induced by erroneous impressions derived from instructions. The court perceives no sound basis for the contention.

In one instruction it was said the burden of proof respecting contributory negligence rested on the defendant, without referring to the fact that the plaintiff's evidence might be looked

to. The instruction is to be read with another which discussed contributory negligence and directed the jury to consider all the evidence bearing on the subject.

Complaint is made of some of the findings of fact.

It is said the fourth finding is not sustained by the evidence. Leaving out of consideration the defendant's explanation of his conduct, which the jury may not have believed, the finding is sustained by the evidence. If, however, an affirmative answer based on the testimony most favorable to the defendant were given to the interrogatory, the verdict would not be affected.

It is said the eighth finding is inconsistent with the sixth and seventh findings. The proposition is not argued, and is not capable of demonstration.

It is said the jury were not really instructed with reference to the plaintiff's negligence. The record does not support the statement.

It is said there was no evidence that any of the specifications of negligence contained in the ninth finding contributed to the plaintiff's injury. The court finds no difficulty in relating the injury to the causes stated.

It is said, with reference to the tenth finding, that there is no evidence the accident would have been prevented had the defendant done any of the things he omitted to do. The evidence was that when the defendant discovered the plaintiff he was far enough from her to have stopped his automobile before striking her, and the inference is this could have been done by using the emergency brake. If the defendant had been driving at a lawful rate of speed, it is clear the accident would not have happened. Very likely the jury believed the defendant discovered the plaintiff at a greater distance from him than he estimated, and, if so, sounding the horn would no doubt have saved her.

Some of the objections to the evidence, to the instructions, to the findings, and to the verdict, have not been discussed. They have, however, been considered, and none of them is deemed sufficient to warrant a reversal.

The judgment of the district court is affirmed.

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No. 21,396.

FRANK THOMPSON, *Appellant*, v. THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellee*.

## SYLLABUS BY THE COURT.

**ACTION ON TORT—Action on Contract—Not Same Causes of Action—Statute of Limitations.** An action for compensation for property of the plaintiff destroyed through the negligence of the defendant is not brought upon the same cause of action as one to recover an amount agreed to be paid in compromise of a claim of that character, and the pendency of an action founded on such an agreement does not suspend the running of the statute of limitations against an action on the tort.

Appeal from Miami district court; JABEZ O. RANKIN, judge.  
Opinion filed March 9, 1918. Affirmed.

*Alpheus Lane*, and *M. A. Lane*, both of Paola, for the appellant.

*W. W. Brown*, *James W. Reid*, both of Parsons, and *R. E. Coughlin*, of Paola, for the appellee.

The opinion of the court was delivered by

MASON, J.: Frank Thompson brought an action against The Missouri, Kansas & Texas Railway Company to recover \$1,575 damages by reason of a fire negligently set out by the defendant in the operation of its road. The petition was filed more than two years after the injury complained of, and a demurrer to it was sustained on the ground that the statute of limitations had run. The plaintiff appeals. To avoid the bar of the statute he relies upon the provision of the code allowing an additional year in which to begin a new action, where in one brought in due time the plaintiff has failed otherwise than upon the merits. (Gen. Stat. 1915, § 6912.) He pleaded the bringing of a prior action, and the only question involved is whether it was of such a character as to extend the time within which to bring the present proceeding. To have that effect it must have been brought upon the same cause of action. (25 Cyc. 1315; 19 A. & E. Encycl. of L., 2d ed., 265.) The present

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case, as already indicated, is brought to recover compensation for the loss of property destroyed through the negligence of the defendant. The petition in the earlier case alleged that the plaintiff's property was destroyed by a fire negligently set by the defendant, to his damage in the sum of \$2,000, but these allegations were preliminary to the further statement that the plaintiff's claim arising therefrom was compromised, the defendant agreeing to pay, and the plaintiff to accept, \$1,393.50 in full settlement thereof; a payment of half this amount was alleged, and the action was brought to recover the remainder. We agree with the trial court in its conclusion that the two cases were not brought upon the same cause of action. The earlier one was founded upon a contract, the later upon tort. In the first action the plaintiff, in order to recover, was not obliged to prove the negligent conduct of the defendant, or the value of the property destroyed, and the complete disproof of his allegations in regard to these matters would have availed the defendant nothing. The existence of a controversy, irrespective of the merits, so that there was no bad faith, was a sufficient basis for the agreement to pay. (*Shellberg v. McMahon*, 98 Kan. 46, 157 Pac. 407.) If the plaintiff had recovered a judgment it would not have been because of the defendant's negligence, but because of its promise. True, facts were set out in the petition which might perhaps have been sufficient, by a very liberal construction, to constitute a cause of action in tort, if they had been relied upon for that purpose; but the other allegations, coupled with the prayer, showed affirmatively that the plaintiff was not relying upon these facts as his ground of recovery—he was not suing upon them; their statement was incidental to his statement of a cause of action upon the contract. The language of an early case is pertinent to the situation:

“But could a party thus keep alive one cause of action by instituting a different one, and when witnesses are gone, and facts forgotten, dismiss one and then bring another? Such at least is not the policy of the law.” (*Hiatt v. Auld*, 11 Kan. 176, 183.)

The judgment is affirmed.

No. 21,398.

THE STATE OF KANSAS, *Appellee*, v. W. P. FLEEMAN, *Appellant*.

## SYLLABUS BY THE COURT.

1. WHITE SLAVE LAW—*Regularly Enacted*. Chapter 179 of the Laws of 1913, commonly known as the white slave law, was regularly enacted.
2. PRELIMINARY EXAMINATION—*Accused Held for Offense Not Charged in Warrant—New Complaint*. A person arrested on a warrant based on a complaint charging one felony may be bound over for another felony shown to have been committed by the evidence adduced at the preliminary examination. When this occurs it is not necessary or proper to file a new complaint.
3. SAME—*Waiver by Defendant*. The proceedings at a preliminary examination considered, and *held*, the defendant waived the right to introduce evidence.
4. WHITE SLAVE LAW—*Information—Not Bad for Duplicity*. Section 2 of the act referred to creates a single offense, and an information is not bad for duplicity which charges a person with keeping and maintaining, and assisting in keeping and maintaining, a place where all the immoralities named in the act are practiced, permitted, and allowed.
5. SAME—*Valid Information*. A motion to quash an information drawn under the section referred to, on the ground of indefiniteness and uncertainty, considered, and *held*, the matters complained of did not affect the defendant's substantial rights.
6. SAME—*Amendment of Information*. An amendment of the information in a matter of form was properly allowed at the trial.
7. SAME—*Amendment of Information—Reverification*. After the amendment the information was reverified. The reverification was unnecessary, and did not furnish ground for quashing the information.
8. SAME—*Evidence of General Reputation of Place*. General reputation of the place described in the information was admissible.
9. SAME—*Impeachment of Defendant*. The evidence considered, and *held*, sufficient ground for impeaching the defendant was laid, prejudicial error was not committed in striking out the answer to a question propounded to a witness, and proper foundation was not laid for assigning error on a ruling sustaining an objection to evidence.
10. NEW TRIAL—*General Reputation of Witness—Diligence*. The general reputation for truth and veracity of a witness for the state whose name is regularly indorsed on the information should ordinarily be discovered before the trial.
11. SAME—*Newly Discovered Impeaching Evidence*. It is not error to deny a new trial desired for the purpose of producing newly discovered impeaching evidence.

12. SAME. The finding of the district court, on affidavits contradicted by oral testimony, respecting the merits of a motion for a new trial will not be disturbed on appeal.

Appeal from Montgomery district court; JOSEPH W. HOLDREN, judge. Opinion filed March 9, 1918. Affirmed.

*Harold McGugin*, of Coffeyville, *F. W. Mahin*, and *I. M. Mahin*, both of Smith Center, for the appellant.

*S. M. Brewster*, attorney-general, *Thurman Hill*, county attorney, and *George D. Higgins*, assistant county attorney, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The defendant was convicted of maintaining a place where prostitution was practiced, contrary to the provisions of section 2 of chapter 179 of the Laws of 1913 (Gen. Stat. 1915, § 3647), miscalled in extravagant newspaper phrase "the white slave law."

The defendant contends the matter published in the statute book never became a law.

The original bill was house bill No. 40. It was amended in committee of the whole according to the recommendation of the judiciary committee, and was passed by the house on January 23, 1913. The bill was amended in the senate, and was passed, as amended, on February 13. On the evening of February 13 the bill was returned to the house. At the morning session of February 14 the house nonconcurrent in the senate amendments and asked for a conference. Conferees agreed on a report. The senate amendments materially changed section 1 and slightly modified section 6. The conference report eliminated the senate amendments to section 1, and accepted the senate amendments to section 6. The conference report was adopted by both houses on February 21. The enrolled bill, duly authenticated by the presiding officer of each house, was approved and signed by the governor on February 25. The secretary of state received the enrolled bill on March 1, and it was published in the official state paper on March 3. Indorsements on the enrolled bill show the passage of the bill in each house, with the date, and the

adoption of the conference report by each house, with the date.

There are in the office of the secretary of state two documents, each purporting to be original house bill No. 40. To one the report of the house judiciary committee is attached. The legislative history indorsed on the back stops with the action of the house committee of the whole, recommending the bill for passage as amended by the judiciary committee. The other document, starting with the same matter, has the senate amendments attached to it. The legislative history indorsed on the back is complete, including an indorsement of the adoption of the conference report by each house, and the conference report made to the house, where presumably the bill remained after return from the senate, is attached. On the back of this document is an indorsement, in two kinds of ink and two styles of writing, indicating a change by addition. It now reads as follows, the original matter being italicised:

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*"House concurred in senate amendment* Conference asked." The senate journal contains a message received from the house on February 21, that the house had concurred in the senate amendments to house bill No. 40. The senate journal contains no message of nonconcurrence from the house, and contains no record of the appointment of senate conferees. In the secretary of state's office is an enrolled bill, duly authenticated, and signed by the governor on February 25, containing the senate amendments. On the document is indorsed passage by the house on January 23, passage by the senate on February 13, and the following: "House concurred to senate amendments February 21, 1913." This document was received by the secretary of state on February 26, and was published in the official state paper on February 27.

An enrolled bill is well-nigh conclusive evidence of the action of the legislature. In this instance each enrolled bill is as complete, perfect, and authentic as the other. Each one provided it should take effect on publication in the official state paper. The constitution reads as follows:

"The legislature shall prescribe the time when its acts shall be in force, and shall provide for the speedy publication of the same; and

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no law of a general nature shall be in force until the same be published." (Art. 2, § 19, Gen. Stat. 1915, § 159.)

The enrolled bill containing the senate amendments was published on February 27, and became effective, if at all, on that date. The other was of no force until published. It was published on March 3. If the two bills are so inconsistent that both cannot stand, and they probably are, the one published on March 3 is the later enactment and the law. If they are not inconsistent, the defendant was prosecuted under the later law.

The defendant appeals to other evidence than the enrolled bill to show that the law contained in the statute book was not passed. The only competent evidence is the journal which the constitution requires each house to keep and publish. To overcome the verity of an enrolled bill the legislative journals must clearly and affirmatively establish its invalidity. In this instance the legislative journals clearly and affirmatively establish the validity of the enrolled bill which omits the senate amendments to section 1.

The legislative proceedings are regular until house bill No. 40 was returned to the house with the senate amendments. The senate journal shows a communication from the house stating the amendments were agreed to. The house journal, however, affirmatively shows prompt nonconurrence, request for conference, appointment of conferees, report of the conference committee, and adoption of the conference report which eliminated the senate amendments. The senate journal merely recorded a communication. It could not constitute the constitutional record of the house proceedings. What the house does is recorded in the house journal, which is the best evidence of its action. Besides this, later in the day on which the house communication was received by the senate, the senate heard the report of its own conferees, and adopted the conference report by a yea and nay vote entered on the journal. This is the final action of the senate, and no matter what may have occurred previously, is conclusive with respect to what the senate did with house bill No. 40. It is true there is no senate record of notice of nonconurrence by the house, or of the appointment of senate conferees. Inferences from silence and omission, however,



cannot prevail against affirmative declarations of the legislative record.

The two documents reposing in the office of the secretary of state, each purporting to be original house bill No. 40, confirm the legislative record. The one which shows no action beyond that of the house committee of the whole is unimportant. The other is clearly the one from which the enrolled bill was prepared, and faithfully corresponds to the legislative record, including adoption of the conference report by the two houses. The corrected indorsement showing the house action concerning the senate amendments corresponds to the house journal. These documents could not be considered in opposition to the enrolled bill or the legislative journals. They are, however, consistent with both.

The constitution makes no provision for indorsement on an enrolled bill of any portion of its legislative history. The presiding officers of the two houses sign it, and that is all. The action of each house is shown by its journal. Therefore, the notation on the enrolled bill containing the senate amendments, "House concurred to senate amendments February 21, 1913," is no part of the bill, and is not the best evidence of what the house did.

The clear and affirmative evidence which establishes the regularity of the enrolled bill which omits the senate amendments excludes all reasonable probability of the other having been passed. The theory of the defendant is, the house in fact concurred in the senate amendments. The enrolled bill was made up accordingly and sent to the governor. A vigilant lobby discovered what had been done and protested so vigorously that some legislative commotion ensued, which led to shuffling of documents and records and the promulgation of an act which had not been passed. The court is bound by the records showing the house did not concur in the senate amendments, and showing the senate receded from the amendments which caused the disagreement. If there could have been more than one house bill No. 40, or if there were but one enrolled bill based on house bill No. 40, some presumptions might reasonably, perhaps necessarily, be indulged. As the matter stands, any presumption resorted to to sustain one enrolled bill could be indulged to sustain the other, and the bill last published would be the law.

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The court holds the defendant was prosecuted under a statute regularly enacted.

The information contained two counts. The defendant was convicted on the second count only, the nature of which has been stated, and the first count is no longer material. The defendant complains because his plea in abatement, grounded on the fact he had no preliminary examination, was overruled.

A complaint was filed charging the defendant with statutory rape. A warrant was issued on which he was taken into custody. Legality of the detention was not contested, and the complaint passed into history. A preliminary examination was held on the charge stated in the warrant. The evidence developed commission of the crime stated in the information, and the defendant was bound over to answer for that crime. The warrant then passed into history. The defendant cross-examined the state's witnesses. When the state rested, the defendant was asked if he was ready to call his witnesses. He said no, but rested. He then demanded a preliminary examination of the offense disclosed by the evidence. When his demand was overruled he offered no evidence and asked for no continuance to enable him to obtain evidence.

The writer of the opinion in the case of *Redmond v. The State*, 12 Kan. 172, ventured the assertion that when a person is arrested for one crime, and on preliminary examination is bound over for another, a new complaint ought to be filed, but said the statute does not require it. The reason the statute does not require a new complaint is that the accused is already in custody, and the complaint has no function to perform except to furnish the basis for a warrant. For forty-five years the legislature has ignored the suggestion, and it may now be regarded, not only as *obiter*, but as *defunct obiter*.

In this instance the county attorney filed a new complaint and had a new warrant issued. They served no purpose whatever, except to afford the defendant opportunity to multiply objections to the regularity of the preliminary procedure. If he had desired, in good faith, to meet the evidence which the state had introduced, he would have been given an opportunity as a matter of course. He chose, however, to stand on the proposition that he had not received the benefit of a prelimi-

nary examination at all, and that he was entitled to a preliminary examination at which he might produce witnesses. The plea in abatement was properly overruled.

The information reads as follows:

"That heretofore and to-wit, on or about the 24th day of January, A. D. 1917, at and within the county of Montgomery and the state of Kansas, the above named defendant, W. P. Fleeman, then and there being, did then and there, wilfully, wrongfully, unlawfully, and feloniously keep and maintain, and assist in keeping and maintaining a brick building located and situated on [lots described], more particularly described as The Oriental Rooms, a place where prostitution, fornication, and concubinage is practiced, permitted, and allowed, and that said above described premises are owned or leased by the said defendant and under his control; all contrary to and in violation of the form of the statutes in such case made and provided, and against the peace and dignity of the state of Kansas."

A motion to quash was overruled. The defendant says he was charged in a single count with numerous felonies—keeping a place where prostitution was practiced, keeping a place where fornication was practiced, keeping a place where concubinage was practiced, and several others. He further says he was bewildered by uncertainty whether he should prepare to meet evidence that he kept the place, or only assisted in keeping it, and evidence that he owned the place, or merely leased it. The statute creates a single offense—keeping a place for unlawful sexual commerce on premises for which the keeper is responsible. The keeping may be by one who keeps, or maintains, or who assists in keeping, or maintaining. The place may be a house, or any other place. The commerce may be prostitution, fornication, or concubinage, and the place may be one distinctively for such commerce, or one where such commerce is practiced, or is permitted, or is allowed. Responsibility for the premises may be by virtue of ownership, or lease, or control. The substance of the offense is keeping a vicious place, and only one offense is committed if all the immoral practices named be indulged there.

One who assists in keeping an immoral resort keeps it to the extent of his participation, although others also participate. Assigning to him the character of assistant does not relieve him of the character of keeper. No distinction is made in procedure or punishment between a keeper sole and an assistant. The gist of the matter to be proved—keeping—is

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the same. A charge of keeping would be sustained by proof of assisting, and both capacities may be attributed to the same person without affecting the certainty of the charge.

The defendant might have been charged in one count as owner, as lessee, and as in control of the premises. Sufficient authority over the premises to prevent disreputable practices there is the important thing. If there be any repugnancy between owning and leasing, it would not defeat the information, because the crime would nevertheless be indicated. (Gen. Stat. 1915, § 8024.) It would be useless formality to multiply counts in order to meet contingencies of proof. In this instance the defendant was charged with being in control of the premises described, and it was further charged that he was owner or lessee. He was informed of the nature and cause of the accusation against him. (Bill of Rights, § 10, Gen. Stat. 1915, § 114.) The court could pronounce judgment according to the right of the case (Gen. Stat. 1915, § 8023), and the defendant could not be prejudiced in his substantial rights on the merits. (Gen. Stat. 1915, § 8024.)

At the trial the defendant testified he owned the "Oriental Rooms" and spent all of his time there. Conceding the information was defective, it would be the quintessence of nonsense to reverse the judgment because of the fact, even if there were no statute on the subject. The statute reads as follows:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." (Crim. Code, § 293, Gen. Stat. 1915, § 8215.)

The record discloses that none of the exceptions taken to the information affected the defendant's substantial rights.

The code of criminal procedure was framed to supersede the common law with a more rational system. While it is defective in many respects, and in many others exhibits a conservatism which contrasts strongly with its general liberality, it is distinctively modern. The tradition of the common law, however, was so strong that it came near superseding the code. In time the code was rediscovered, and it is the purpose of the court to interpret and apply it according to its true intent and spirit.

The defendant complains because the information was amended at the trial. The amendment consisted in writing the

words "County attorney of Montgomery county, Kansas," under the signature of the county attorney to the verification. The amendment was one of form only, the defendant calls it a matter of form, and the statute expressly authorizes amendments in matters of form at the trial, so the complaint is frivolous.

The statute reads as follows :

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. No amendment shall cause any delay of the trial, unless for good cause shown by affidavit." (Gen. Stat. 1915, § 7982.)

How any amendment of form, as distinguished from substance, can ever prejudice a defendant, this court is unable to perceive.

After amending the information the county attorney verified it, which was wholly unnecessary. The defendant then filed a new motion to quash, which was properly overruled.

The defendant complains because the general reputation of the place was proved. The evidence was admissible for two purposes. It was admissible to prove the actual character of the place. The authorities are divided on this question, but the fact that a house has acquired a general reputation in the community of being an immoral resort is some evidence that it is such. While the evidence may be weak, it is not to be rejected on that account. The evidence was admissible for the purpose of charging the defendant with notice of the character of the place. The person who owns or controls an immoral resort is not likely to be ignorant of what the community knows. Notice was relevant to the issue of permission and allowance.

The defendant complains of some impeaching testimony, because he says the proper foundation was not laid by calling his attention to specific time and place. The question was whether or not the defendant had an arrangement with named girls whom he employed, to send them to men's rooms and divide their earnings on a stated basis. The defendant told what his arrangement with the girls was. He was then asked if his arrangement was not of the character stated. He vehemently denied such an arrangement, and said he never

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hinted such a thing. Under these circumstances he fairly exposed himself to impeachment without going further into details.

A police officer had occasion to go through the defendant's place. He was called as a witness and was asked if the defendant demanded that he have a warrant. He said no, and the answer was stricken out. In view of the abundant, direct, and positive evidence of guilt, it is not likely this answer would have worked an acquittal. The officer was asked a further question, and was not permitted to answer. What his answer would have been was not shown at the hearing on the motion for a new trial.

A motion for a new trial was filed on the ground of newly discovered evidence. The evidence was, bad general reputation for truth and veracity of one of the state's witnesses, and impeaching evidence. The names of witnesses are indorsed on the information so that the defendant may look up notorious facts like general reputation, and the rule is well established that it is not error to deny a new trial desired for the purpose of producing newly discovered impeaching evidence. The witness for the state who was called in rebuttal to impeach the defendant made an affidavit in which she repudiated the testimony which she gave at the trial. The defendant says he relies on the case of *The State v. Keleher*, 74 Kan. 631, 87 Pac. 738. The Keleher case was a very exceptional one. The present case belongs to a very common class. At the hearing the state contested the motion for a new trial. After hearing all the evidence introduced the court found against the defendant. Nothing appears to indicate the ordinary rule should not be applied. (*The State v. Baker*, 78 Kan. 663, syl. ¶ 2, 97 Pac. 785.)

The judgment of the district court is affirmed.

No. 21,403.

JAMES E. DRYSDALE, *Appellee*, v. WILLIAM WETZ, FRED WETZ,  
and HERMAN WETZ, *Appellants*.

## SYLLABUS BY THE COURT.

1. **ASSAULT — Conspiracy — Order of Proof — Judicial Discretion.** The order in which proof of a conspiracy is received rests to a large extent in the discretion of the court, and in this case it is held that defendants were not prejudiced by the admission in evidence of declarations made by one of the defendants before proof of the conspiracy, it being followed up by sufficient evidence to establish the existence of the conspiracy as alleged.
2. **SAME—Instructions to be Construed as a Whole.** An instruction is not to be condemned by separating from its context language in one part of it and ignoring the instruction as a whole.
3. **SAME.** Objections to certain instructions examined, and held to be without merit, the abstract making no reference to the other instructions given.
4. **TRIAL—Witness Rebuked by Court before Jury—No Error.** While testifying as a witness, one of the defendants made a voluntary statement outside of the case which called for a rebuke by the court and an admonition not to repeat the offense. *Held*, that the incident was not likely to have prejudiced defendants, but if it did they cannot complain.

Appeal from Barber district court; GEORGE L. HAY, judge.  
Opinion filed March 9, 1918. Affirmed.

G. M. Martin, of Medicine Lodge, for the appellants.

Seward I. Field, J. N. Tincher, both of Medicine Lodge, and  
A. L. Noble, of Winfield, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The plaintiff sued to recover actual and exemplary damages for an assault and battery, alleging that the defendants unlawfully conspired to assault and beat him. The jury returned a verdict in his favor for \$1,000, upon which judgment was rendered, and the defendants appeal.

Fred Wetz filed a separate answer admitting that he had struck the plaintiff, but alleged provocation by plaintiff's insults and threats. Separate answers were filed by the other

two defendants denying any conspiracy or participation in the assault.

William Wetz is the father of Herman and Fred Wetz. The plaintiff had been employed by defendants on their ranch in Barber county, and had been discharged or for some reason left their service, and had sued them before a justice of the peace to recover his wages. The alleged assault occurred on the street in Kiowa on the 18th of July, immediately after the jury in the civil action in the justice court had returned a verdict in his favor against the defendants for the amount he claimed to be due.

On the trial of this action one of plaintiff's attorneys testified that on the return day of the summons in the civil action William Wetz appeared before the justice to have that case continued, and in the presence of the justice repeatedly cursed Drysdale and threatened that if he tried to have a lawsuit with him he would get his boys and kill him, and that the justice of the peace had difficulty in quieting Wetz. The allegation in the petition was that on or about July 18, 1916, the defendants conspired together to commit the assault. It is objected that no conspiracy had yet been shown and that the testimony of the witness concerning the declarations by one of the alleged conspirators was inadmissible. It was followed up, however, by abundant evidence tending to show the conspiracy; and the order of proof in such cases rests largely in the discretion of the trial court. The admission of the evidence at the time could not have prejudiced the defendants. Only general objections were made to its admission, and there was no request for an instruction limiting its effect or scope.

The court gave the following instruction:

"As I have heretofore said to you the defendant Fred Wetz, in his answer admits that he struck the plaintiff once at the time and place set out in plaintiff's petition and you are instructed that this admission by the defendant Fred Wetz is binding upon him for all of the purposes of this trial and the jury will consider it as an admitted fact in the case in so far as the defendant Fred Wetz is concerned but no further."

It is seriously insisted that the language "for all of the purposes of this trial" justified the jury in considering the admission in the answer of Fred Wetz as evidence of the alleged conspiracy. The complaint is merely another instance of an attempt to condemn an instruction by separating from its con-



text language of the court without considering the instruction as a whole. The court distinctly charged that the answer was to be considered by the jury as an admitted fact in the case "in so far as the defendant Fred Wetz is concerned but no further."

We cannot agree with the contention urged in the defendant's brief that the fact that the old man and his boys were seen together immediately before the assault was no evidence of a criminal conspiracy to harm the plaintiff. The plaintiff testified that just before the assault his wife and children drove up in a buggy, and he was standing by the side of the buggy in the street talking to them; that just then he looked and saw the three defendants standing talking together a short distance away. This was a circumstance tending, in connection with the other testimony, to show a conspiracy on the part of the defendants to commit the assault.

A careful examination of the instructions complained of discloses that the objections urged against them are without merit. The court properly instructed that the alleged conspiracy might be proved by circumstantial evidence, and it was not the duty of the court to comment upon the evidence and inform the jury what circumstances in the evidence would justify them in finding that a conspiracy existed. The abstract sets out instructions 6, 8, 9, 12 and 14, which are complained of, and omits all reference to the others which the court gave. We must assume that the court covered the issues in the other instructions given. Instruction No. 9 is criticized on the theory that it authorized the jury to find a fact from circumstantial evidence. This was proper. (*Bank v. Freeburg*, 84 Kan. 235, 114 Pac. 207.) The court pointed out no special circumstances in evidence as being convincing, but left to the jury to determine the inferences to be drawn from the circumstances proved. Instruction No. 12 is not open to the objection that it puts all damages into one catalogue and disposes of them under the same rule of proof. The instruction, which relates to actual damages, charged the jury to estimate the damages from the facts and circumstances in proof, and to consider these in connection with their knowledge, observation, and experience. There was no error in charging that it was not necessary that any witness should

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express an opinion as to the amount of the damages. (*Schaap v. Hayes*, 99 Kan. 36, 160 Pac. 977.)

There was evidence showing that the defendants were tried in the police court for the alleged assault and entered pleas of guilty. The court refused a requested instruction that this evidence was not conclusive of the guilt of the defendants, but should be considered in connection with all of the evidence for the purpose of determining whether or not the defendants, or any of them, assaulted the plaintiff as charged in the petition. As observed, we are not informed what the other instructions charged. While the requested instruction might have been given, no prejudice is shown by its refusal; and there is no force in the contention that the jury were permitted to consider the record in the police court as a basis for exemplary damages. Besides, the requested instruction made no reference to the question of damages.

On cross-examination William Wetz was asked if he had not had considerable litigation since he came to Barber county, and also whether he had not stated that he "had plenty of money and the boys could spend it," and that he was going to keep Drysdale out of his money as long as possible. We perceive no error in permitting these questions on cross-examination. They are the only ones to which timely objections were made.

While testifying as a witness, William Wetz made this remark: "If my boy just struck that boy's face and you come and make a howl and it was not as much as when old man Roosevelt got shot." Thereupon the court admonished him as follows: "Do not refer to any president of the United States, or ex-president. Treat them with respect. I don't want you to do that again in this court." It is seriously insisted that "this chastisement" by the court prejudiced William Wetz before the jury. The court saw fit to rebuke the witness for making a voluntary statement which had nothing to do with the case. The plaintiff's rights should not suffer, especially since the incident was not likely to have seriously prejudiced the defendants.

The judgment is affirmed.

No. 21,411.

JUSTUS B. LINDERHOLM, *Plaintiff*, v. J. W. WALKER, as Probate Judge of McPherson County, *Defendant*.

## SYLLABUS BY THE COURT.

1. MANDAMUS — *Approval of Appeal Bond by Probate Judge.* The supreme court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency, when the judge's good faith is not challenged.
2. SAME—*Writ Should Not Issue.* Some other simple reasons showing why writ of mandamus should not issue, discussed.
3. INSANE PERSON—*Cannot Conduct Litigation.* A person who has been adjudged insane, and who is under guardianship, cannot conduct litigation without the supervision, control, and protection of his guardian.
4. SAME. When it clearly appears that a person who has been adjudged insane is the plaintiff in an action, and that he is seeking to maintain that action independently of his guardian and without the approval of the latter, the action should be dismissed.

Original proceeding in mandamus. Opinion filed March 9, 1918. Writ denied, and cause dismissed.

*Justus B. Linderholm*, of Topeka, *pro se*.

*Frank O. Johnson*, *G. F. Grattan*, and *J. M. Grattan*, all of McPherson, for the defendant.

The opinion of the court was delivered by

DAWSON, J.: This is an application for an alternative writ of mandamus, to require the probate judge of McPherson county to approve an appeal bond in a certain matter which the petitioner seeks to appeal to the district court from the judgment of the probate court, and to certify it to the district court. The particular grievance which the petitioner desires to have reviewed by the district court was the question of the propriety of an order of the probate court discharging Mrs. Agnes Ekblad as executrix of her deceased husband's estate, the latter in his lifetime having been guardian of the estate of the petitioner. The probate judge disapproved the bond and refused to certify the matters to the district court.

In behalf of the probate judge, an answer has been filed in which it is shown that the petitioner was adjudged insane some years ago; that thereafter, in May, 1909, the petitioner's mother was appointed and qualified as his guardian, and that she died in a short time; that John Ekblad was then appointed as guardian for the petitioner, and he qualified and acted as such until his death in 1914; and that Frank O. Johnson was afterwards appointed and qualified as guardian of the petitioner, and still is the legal guardian of the petitioner, and is in possession of the petitioner's property. The answer continues:

"That the said Frank O. Johnson had duly settled and collected from the executrix of his predecessor, with the approval of this court, all the funds that came into her hands as such executrix or that had been collected by said John Ekblad, deceased, and belonged to said plaintiff's estate. That at no time did the said plaintiff file any claim against the said estate of John Ekblad, claiming that said estate was indebted to said plaintiff or to his guardian.

. . . . .  
"That the said alleged appeal bond is insufficient, and in the judgment of the said probate court the sureties are not responsible, and it is not in the judgment of said probate court a good and sufficient appeal bond."

To this answer the plaintiff has filed a demurrer, which has the same effect as a motion to quash or a motion for judgment on the pleadings. In other words, for the purpose of testing the sufficiency of the answer, the demurrer admits the truth of the matters pleaded therein.

On the mere statement of the case which we have outlined above, so many sound judicial reasons why the writ should not issue come to mind that we shall limit ourselves to indicating only a few of them, and choose from among those which are simplest, and which may be most readily understood.

A writ of mandamus never issues from a higher court to a lower court to control the discretion of the latter. Here the probate judge exercised his discretion—his best judgment—in holding that the appeal bond was not a good one. There is no allegation in the petition that the probate judge abused his discretion, no showing that he acted arbitrarily or in bad faith. The plaintiff's demurrer admits the facts which are alleged in the probate judge's answer. The demurrer, in effect, says: "Suppose the bond is not a good and sufficient

bond, I want the supreme court to compel Probate Judge Walker to approve it nevertheless." This court could not do that. We could not compel the judge to approve a bond which in his judgment is not a good one, when the petition does not impeach the judge's good faith.

Another matter: The petition does not show that the cause sought to be appealed to the district court was disposed of in the probate court in such a way as to injure any right of the plaintiff. The petition does not show that Mrs. Ekblad was wrongfully given her final discharge as executrix by the probate court. The petition discloses no reason why Mrs. Ekblad should have been denied her discharge. It is not even shown in the petition that the plaintiff had filed any claim in the probate court against the executrix. Why then should she be kept in court and dragged from court to court and harassed with litigation? The state does not maintain courts on the same theory that public parks and playgrounds are maintained—for the mere entertainment and recreation of those who choose to use them. Courts are instituted to deal with the serious controversial matters of men, for the vindication of substantial rights and the redress of substantial wrongs which men cannot settle amicably without the help and authority of the state.

Still another suggestion: The probate judge's answer alleges that the plaintiff was adjudged insane some years ago, and that he is yet under guardianship. A person under such disability cannot conduct litigation in his own behalf. Among the many reasons why he cannot and should not do so is one which is paramount—the temporary incapacity of such person to protect his rights. If an insane person could maintain a lawsuit, he might and probably would lose that lawsuit, because his temporary disability would too severely handicap him in a contest with a wide-awake, enterprising, and perhaps none too scrupulous opponent. Another important reason why a person adjudged insane should not be permitted to indulge in litigious controversies is that they cause worry, anxiety, and mental unrest, while the paramount good of the invalid requires that he be freed from worries, cares, and vexations, in the hope that he may speedily be restored to his mental health and intellectual vigor. Furthermore, parties

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who might be involved in litigation with an insane person have also some rights entitled to protection. If they are dragged into litigation they are entitled to get through with that litigation and be done with it; but a lawsuit with an insane person could not conclude anything. When the insane person was afterwards mentally restored, his legal adversaries would always face the possibility of having to go through the turmoil of the same litigation again, since a judgment against an insane person would not ordinarily bar any right of action existing or accruing to him during his mental infirmity. The law on this subject is neither thoughtless nor unjust. It has provided adequate legal machinery for protecting the rights of insane persons. If those rights are jeopardized, it is the duty of his legal guardian to attend to them, and the petition discloses nothing from which it could be assumed that the guardian has neglected his duty touching Mrs. Ekblad's claim of right to her final discharge as executrix. It also appears from the pleadings that the plaintiff's guardian does not approve of the litigation which the plaintiff seeks to maintain, and the petition does not impeach the guardian's good faith.

The court indulges the hope that it has made this subject sufficiently plain for the petitioner's comprehension. The writ must be denied, and this case is dismissed.

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No. 21,413.

WILLIAM MANSFIELD, *Appellee*, v. THE WILLIAM J. BURNS  
INTERNATIONAL DETECTIVE AGENCY, *Appellant*.

## SYLLABUS BY THE COURT.

1. MASTER AND SERVANT—*Tortious Acts of Servant—Liability of Principal*. A master or principal is responsible for the tortious acts of his servant or agent where such acts are incidental to and done in furtherance of the business of the master or principal, even if such acts are done willfully or in excess of the authority conferred.
2. SAME—*Agent of Detective Agency—Assaulting Suspected Criminal—Extorting Confession*. Where one representing a detective agency is authorized to obtain a confession from a suspect, and in executing that authority commits an assault and battery upon the subject, the principal is responsible for the manner of the agent in the execution of the

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authority and for the wrong of the agent in selecting the means by which the authority was executed.

3. *ASSAULT—Damages—Trial—Counsel Reading Magazine to Jury.* The reading of a short article from a magazine in the course of the argument of counsel, which was argumentative and illustrative in character, condemning such methods as were employed by the agent of the defendant in the present case and containing statements which would have been unobjectionable if they had been original with counsel, is held not to be a ground of prejudicial error.

Appeal from Wyandotte district court, division No. 2; FRANK D. HUTCHINGS, judge. Opinion filed March 9, 1918. Affirmed.

*J. H. Brady, E. H. Henning*, both of Kansas City, *J. B. Larimer*, of Topeka, *Wentworth E. Griffin*, and *Cameron L. Orr*, both of Kansas City, Mo., for the appellant.

*L. C. True, Jacob S. Detwiler*, and *E. E. Martin*, all of Kansas City, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by William Mansfield against the William J. Burns International Detective Agency to recover damages for assault and battery. The defendant appeals from the judgment in the sum of \$2,250 in plaintiff's favor rendered upon the verdict of a jury.

A family by the name of Moore living near Red Oak, Ia., were murdered in 1912 by some person who used an axe in perpetrating the deed. The defendant was employed to discover the murderer, and James M. Wilkerson, a detective employed by defendant to act for it in Kansas, was assigned to the case. Wilkerson looked up plaintiff's record and came to the conclusion that he was the one who had committed the murder and was the same person as "Insane Blackie," a person who had the reputation of having committed crimes of that character. Wilkerson went to the packing house in Kansas City where plaintiff was employed, called him from his work and told him he was under arrest. He called him "Insane Blackie" and thrust up his chin in order to see a scar upon his neck by which he sought to identify him. Police officers of Kansas City having been summoned, Wilkerson and the latter, without any

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warrant having been issued for plaintiff's arrest, conducted him to a waiting automobile in which they took him to police station No. 1 where he was confined for a short time. Thence he was taken in an automobile across the river to station No. 4, in Argentine, where he was confined and sweated all night without rest, and the next morning he was returned to station No. 1, from which he was later removed to the county jail. Plaintiff testified that while crossing the bridge on the way to station No. 4, Wilkerson punched him in the ribs and threatened to throw him in the river if he did not confess to the crime; and that he was plied with questions all night at station No. 4, where Wilkerson threatened and cursed him and applied vile epithets to him, struck him in the face and loosened some of his teeth, brandished an axe about his head and against his cheek, telling him he would be killed the same way the Moore family had been killed, pushed him down over a chair and injured his body, and deprived him of food and water, all in an attempt to obtain a confession from him. He also testified that after he was returned to station No. 1, Wilkerson again struck him squarely in the mouth. Physicians who had examined plaintiff at the jail testified to finding certain injuries upon his body. These acts of violence were contradicted by Wilkerson in his testimony, but the conflict in the testimony was settled in favor of the plaintiff by the general verdict, no special findings having been requested.

The principal contention of the defendant is that the acts of violence toward the plaintiff, the brutal assaults committed on him, and the torture to which he was subjected by its agent, Wilkerson, were outside the scope of his employment, and for them the defendant is not liable. The general rule is that a master or principal is liable for the tortious acts of his servant or agent where such acts are incidental to and done in furtherance of the business of the master or principal, and this is true although the servant or agent acted in excess of the authority conferred upon him or willfully or maliciously committed the wrongs.

In *Hynes v. Jungren*, 8 Kan. 391, where it was alleged that an agent willfully assaulted and beat the plaintiff and wrongfully detained him in jail, and where the principal defended



upon the ground that the agent acted as a constable under an order of civil arrest, it was held that, the agent having acted wrongfully in doing that which he was directed to do, the principal was responsible for his acts whether the agent acted innocently or maliciously.

In *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, the principal was held liable for the acts of its agent in arresting and detaining the plaintiff, it appearing that the acts were incidental to and done in furtherance of the principal's business, and this notwithstanding that the principal did not directly authorize nor subsequently ratify the tortious acts.

In a case where a brakeman wrongfully pushed a man off a train, the railway company insisted that the act was outside of any duty the brakeman owed to the company, and that it was not liable for his act, although he might have done it in the interest of the company. It was held that his act was within the scope of his implied authority, and hence the company might be held responsible for his acts. (*O'Banion v. Railway Co.*, 65 Kan. 352, 69 Pac. 353.)

In another case it was held that a master might be held liable for the acts of his servant in setting out a fire, if the setting of the fire was a part of the business, or resulted from some act done in the performance of the business, of the principal. (*Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141.)

In *Crelly v. Telephone Co.*, 84 Kan. 19, 113 Pac. 386, it was held that the master was not responsible for an assault committed while the servant was in its service, but which was not done in the course of the employment. It was added, however, that if the tortious acts were done in the execution of the master's business and as a means of performing the work assigned to the servant the master would be liable although the acts were willfully and wantonly done.

In *Lehnen v. Hines & Co.*, 88 Kan. 58, 127 Pac. 612, a proprietor of a hotel was held responsible for the acts of his clerk, who assaulted and beat a guest and caused her to be arrested and taken from the hotel because she declined to leave the hotel on the demand of the clerk, as against a contention that the clerk was acting for himself and not for the proprietor nor within the scope of his employment when the

assault was committed. It was held that as the clerk had charge of the hotel for the time being, and as the wrongful acts were committed by him while he was in the control of the hotel and as a means of exercising such control, he was acting for the proprietor and the latter was responsible.

Other cases of like import are: *Whitman v. Railway Co.*, 85 Kan. 150, 116 Pac. 234; *Roberts v. Kinley*, 89 Kan. 885, 132 Pac. 1180; *Martin v. Railway Co.*, 93 Kan. 681, 145 Pac. 849; *Sipult v. Land and Grain Co.*, 94 Kan. 224, 146 Pac. 329.

In some cases the line between acts which are within and those which are without the scope of employment is not easily traced, but in this case no difficulty can arise. It is conceded that Wilkerson was acting within his authority in the examination of the plaintiff and in the effort to obtain a confession from him. While Wilkerson denies the acts of cruelty and torture with which he is charged, he admitted that whatever he had done in making the investigation and in the effort to obtain a confession was done at the instance of the defendant. The verdict involves a finding that Wilkerson assaulted and beat the plaintiff, and did it with such force and violence as to loosen his teeth and to cause bruises and lameness, and that he went to the extent of swinging an axe over and against him in order to make him confess the commission of the crime of murder of which he was innocent. Defendant says that the detection of crime, in which it is engaged, is a lawful and honorable business, one that may be carried on by legal means, and that it should not be held liable for brutal assaults and the beating up of suspects with axes that may have been committed by its agents while engaged in its business. No doubt there may be a searching investigation without inhumanity, nor is there any doubt that the business may be carried on by legal and efficient methods, without putting suspects on the rack or extorting confessions by the drastic and cruel means that were employed in this instance; yet, withal, the acts of its agent appear to have been done in the course of his employment. Authority was conferred on Wilkerson to secure a confession, and in the execution of this authority the wrongs complained of were committed. The agent selected the means by which the orders of his principal were to be carried out and the confession was to be obtained, and the methods employed

by him in this case were therefore employed in the course of the business of the principal and in doing what the agent was employed to do. As we have seen, a principal is ordinarily responsible for the acts of his agent done in furtherance of his business, for the manner employed by the agent in the execution of his orders, and for the wrong of the agent in selecting the means by which the authority is to be executed.

There is nothing substantial in the complaint that the court failed to give the jury a correct statement of the issues involved in the case. It is stated that the court gave an epitome of the allegations of the petition, and that some of them set out the arrest and detention of the plaintiff and carried the implication that a recovery might be had on that ground. There was no chance for a mistake in this respect, as it was expressly stated that the plaintiff claimed no damages except for assault and battery. The allegations referred to were preliminary to those setting forth the assaults that were committed, and were no more than a statement of the circumstances under which these assaults were made. In view of the positive disclaimer of damages for false imprisonment, and the fact that every one connected with the trial understood that the only damages sought in the case were for assault and battery, no prejudice could have resulted from the reference to the arrest. Besides, in the instructions the court directly informed the jury that the only damages plaintiff could recover were those sustained by reason of assault and battery committed upon the plaintiff, if any was committed. We think the instructions taken together fairly presented the case to the jury, and that there is no merit in any of the objections presented.

It is finally contended that error was committed by the court in permitting counsel for plaintiff to read to the jury a short magazine article in condemnation of such practices as Wilkerson employed in the present case, and which are called the administration of the "third degree." The article was read as a part of counsel's argument, and the matter contained in it was argumentative and illustrative in character and would have been unobjectionable if it had been original with counsel. Indeed, stronger language might have been used in characterizing and condemning the means employed by the agent of the defendant than was used in the article read, without trenching

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upon the bounds of permissible argument or of committing prejudicial error.

The judgment is affirmed.

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No. 21,564.

THE STATE OF KANSAS, *Appellee*, v. L. O. HEITMAN, *Appellant*.

SYLLABUS BY THE COURT.

1. ARSON—*Expression Used by Defendant—Inferences for Jury*. No error is committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used, when the situation is such that all the data from which an inference on the subject might be drawn could readily be made available to the jury.
2. SAME—*Trial—Instructions—Burden of Proof*. In a criminal case the jury were told that they should acquit the defendant unless they found from the evidence beyond a reasonable doubt all the facts (which were enumerated) necessary to constitute the offense; that no presumption of guilt existed on account of the defendant being charged with crime, but that every presumption of law was in favor of his innocence; and that with respect to an alibi it did not devolve upon him to prove that defense, but that an acquittal must follow if the jury had a reasonable doubt whether he was personally present at the time of the alleged offense. *Held*, that at least in the absence of a specific request, it was not error to omit to instruct, in so many words, that the burden of proof was on the state, that the burden never shifted, and that the defendant was presumed to be innocent until the contrary was proved.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed March 9, 1918. Affirmed.

*Ed Rooney, Otis E. Hungate, and Paul H. Heinz*, all of Topeka, for the appellant.

*S. M. Brewster*, attorney-general, and *Robert D. Garver*, county attorney, for the appellee.

The opinion of the court was delivered by

MASON, J.: L. O. Heitman appeals from a conviction upon a charge of arson. The property burned was a frame building occupied by him as a grocery store and meat market. The fire was obviously incendiary, and the theory of the state is

that the defendant set it for the purpose of collecting the insurance. Only two rulings are challenged—the sustaining of objections to questions asked of a witness, and the omission to include certain instructions in the charge.

1. A witness for the state testified that he saw the fire while he was about a block and a half away, at two o'clock in the morning; that he ran to the store and there met a man who told him he was Heitman, and who appears to have been identified as the defendant by another witness; that he said to this man, "We turned in the alarm as quick as we saw it," and the man merely said, "The son of a bitch." The defendant on cross-examination, in effect, asked to whom the witness understood him to refer, the purpose being to show that the epithet was applied to the person who had set the fire, rather than to the one who had turned in the alarm. Objections to questions of this character were sustained, the court adding that the witness could tell what the speaker said and how he looked and everything of that kind. We see no error in the ruling. There was no occasion for the witness giving his opinion as to what the speaker meant. The facts bearing on that matter were not so complicated or obscure as to make it at all difficult for him to give the jury the benefit of all the information he had on the subject, without stating the judgment he had formed about it. He was not offered as an expert, and the case falls within the rule which has been well stated in these words:

"Such a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them,—in other words, when *by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion.*" (3 Wigmore on Evidence, § 1924.)

If the evidence had been admissible, error in its rejection would not be now available, for no showing was made as to what the answer of the witness would have been if the objections to the questions had been overruled. (*The State v. Wellman*, ante, p. 503, 170 Pac. 1052.)

2. The defendant alleges that the court omitted to instruct the jury that the burden of proof was upon the state, and not upon the defendant, that the burden of proof never shifted,

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and that the defendant was presumed to be innocent until the contrary was proved. The instructions did not make use of this exact language, but the jury were told that they should acquit the defendant unless they found from the evidence beyond a reasonable doubt all the facts (which were enumerated) necessary to constitute the offense; that no presumption of guilt existed on account of the defendant being charged with crime, but that every presumption of law was in favor of his innocence; and that with respect to an alibi it did not devolve upon the defendant to prove that defense by a preponderance of the evidence or beyond a reasonable doubt, but that an acquittal must follow if the jury had a reasonable doubt, whether he was personally present at the time of the alleged offense. The charge therefore showed explicitly that the burden of proof was on the state, that it did not shift, and that the defendant was presumed to be innocent until the contrary was proved. It is not apparent what advantage there could have been in a restatement of these rules according to a particular formula, if a request to that effect had been made. And in the absence of such a request it is clear that no error was committed in this regard.

The judgment is affirmed.

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No, 21,669.

THE STATE OF KANSAS, *Appellee*, v. LAWRENCE PERELLO,  
*Appellant*, et al.

## SYLLABUS BY THE COURT.

1. "BONE-DRY LAW"—*Information—Negative Allegations.* In an information charging the violation of section 1 of the "bone-dry law" (Laws 1917, ch. 215), making it unlawful "for any person to keep or have in his possession . . . any intoxicating liquors . . . or to give away or furnish intoxicating liquors to another, *except druggists or registered pharmacists as hereinafter provided*," it is not necessary to allege that the defendant was not a druggist or registered pharmacist.
2. *SAME.* A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense.

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Appeal from Cherokee district court; JAMES N. DUNBAR, judge. Opinion filed March 9, 1918. Affirmed.

A. L. Majors, of Columbus, for the appellants.

S. M. Brewster, attorney-general, and Don H. Elleman, county attorney, for the appellee.

The opinion of the court was delivered by

PORTER, J.: An information was filed against Lawrence Perello and Louie Soffietti, charging them with having in their possession three sacks of bottled beer, contrary to the statute. They were tried and convicted. Perello appeals from the judgment, and his sole contention is that the information does not state a public offense, because it fails to negative the provisions of the latter portion of section 1 of what is known as the "bone-dry law." (Laws 1917, ch. 215.) Section 1 reads:

"It shall be unlawful for any person to keep or have in his possession, for personal use or otherwise, any intoxicating liquors, or permit another to have or keep or use intoxicating liquors on any premises owned or controlled by him, or to give away or furnish intoxicating liquors to another, *except druggists or registered pharmacists as hereinafter provided*. Any person violating the provisions of this section," etc.

We have italicized that portion which it is contended the information should have negatived. The appellant relies upon the cases of *The State of Kansas v. Thompson*, 2 Kan. 432; *City of Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. 707; *The State v. Thurman*, 65 Kan. 90, 68 Pac. 1081; *The State v. Buis*, 83 Kan. 273, 111 Pac. 189.

In passing upon the question in the early case of *The State of Kansas v. Thompson*, supra, which the later cases follow, the court quoted with approval the following from Archbold's Criminal Practice and Pleading:

"If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or the subject of the indictment does not arise within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading." (p. 436.)

The appellee insists that the exception in the statute is purely a matter of defense because it is not incorporated

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within the enacting clause by any words of reference, and therefore forms no part of the clause which defines or describes the offense.

Among the modern authorities cited by the appellee, the statute considered in the case of *Smythe v. State*, 2 Okla. Crim. 286, is most nearly like that under which the appellant in this case was convicted. The Oklahoma statute reads:

"SECTION 1. It shall be unlawful for any person, individual or corporate, to manufacture, sell, barter, give away, or otherwise furnish *except as in this act provided, any spirituous, vinous, fermented or malt liquors.*" (Revised Laws of Oklahoma [1910], § 3605.)

It was held not necessary to negative the exception, for the reason that—

"A negative averment to the matter of an exception or proviso in a penal statute is not requisite in an information, unless the matter of such exception or proviso enters into, and becomes a material part of, the description of the offense." (*Smythe v. State*, 2 Okla. Crim. 286, syl. ¶ 2.)

The statute we are considering defines the offense, and in the same clause uses the language, "except druggists or registered pharmacists as hereinafter provided." Section 5 of the act enumerates the particular conditions under which liquor may be delivered to certain persons engaged in the wholesale drug business and to registered pharmacists actually and in good faith engaged in the retail drug business, these exceptions being coupled with elaborate provisions designed to prevent evasion of the law. The language in section 1, "except druggists or registered pharmacists as hereinafter provided," does not set forth, nor does it purport to state, except in most general terms, the nature of the exceptions in favor of druggists and registered pharmacists. It is a mere parenthetical expression thrown in to show that in another part of the act provisions will be found which except certain classes of persons from the operation of the statute. As held in the Oklahoma case just cited, we think the rule contended for by the appellant should never apply where the matter of such exception or proviso does not enter into and become a material part of the description of the offense. Although there is a general reference in section 1 to an exception in favor of druggists and registered pharmacists, all druggists and all registered pharmacists are not excepted; and it is necessary to examine the conditions "hereinafter pro-



vided" in order to ascertain what druggists and what registered pharmacists are within the exception.

Again, the rule contended for, if it ever had any substantial ground to rest upon, has become obsolete by the changed conditions in criminal procedure. Without taking time to state the history of its inception, it is enough to say that it is a relic of a period under the old common law when there were so many restrictions upon the rights of an accused person that the courts found it necessary in construing indictments to reach out and seize upon slight technicalities in order to prevent grave miscarriages of justice. It recalls the period when a person charged with crime was denied the benefit of counsel and was not permitted to be sworn as a witness in his own behalf. The court would be making use of an archaism if it attempted to apply such a technical rule of criminal pleading to a procedure like ours, which admonishes us to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties (Crim. Code, § 293), and which declares that no indictment or information may be quashed or set aside for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." (Crim. Code, § 110.)

It is impossible to conceive how the rights of the appellant could have been prejudiced by the failure of the information to negative these exceptions, even if we were to say that the offense was not clearly defined in the clause until the end of the sentence containing the exception. If, when appellant was found in possession of the three sacks of bottled beer, he had been in fact a registered pharmacist or a wholesale druggist as provided in section 5, or any kind of a druggist or registered pharmacist within the language of the exceptions as referred to in section 1, it would have been very easy for him to have shown that fact at the trial, or at least to have challenged the attention of the court to the fact. If the rule of pleading he relies upon were held to be in force and effect, and the language of the statute were held to fall within the rule, a reversal of the judgment and a new trial could not benefit the appellant if under an amended information he should not be able to bring himself within the exception.

The judgment is affirmed.

WEST, J. (dissenting) : To one who has devoted ten years of his life drawing indictments and informations and prosecuting those charged thereunder, it seems needless at this late date to change the rule of criminal pleading heretofore understood by even the veriest tyro in the law and continuously recognized by this court from the second to the ninety-ninth Kansas report. (*The State of Kansas v. Thompson*, 2 Kan. 432; *City of Kansas City v. Garnier*, 57 Kan. 412, 46 Pac. 707; *The State v. Thurman*, 65 Kan. 90, 68 Pac. 1081; *The State v. Buis*, 83 Kan. 273, 111 Pac. 189; *The State v. Creamery Co.*, 83 Kan. 389, 111 Pac. 474; *King v. Wilson*, 95 Kan. 390, 393, 148 Pac. 752; *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188.)

The legislature in prescribing the offense simply made it unlawful for any one except a druggist or registered pharmacist to do the thing prohibited, and this is not only all in one section but all in one sentence.

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No. 21,769.

THE CAPITAL IRON WORKS COMPANY, *Appellee*, v. JOHN KASPAR (THE CHICAGO BONDING AND SURETY COMPANY, *Appellant*).

SYLLABUS BY THE COURT.

PUBLIC BUILDING—*Indemnity Bond—Statute of Limitations*. The terms of a bond given in connection with a contract for the erection of a public building, considered, and *held*, the bond was one to supersede mechanics' liens, to which the general statute of limitations applies.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed March 9, 1918. Affirmed.

*John T. Harding, B. F. Deatherage, David A. Murphy, and Spencer F. Harris*, all of Kansas City, Mo., for the appellant.

*T. F. Garver, and R. D. Garver*, both of Topeka, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one to recover on a bond given in connection with a contract for the erection of a public building. A demurrer was sustained to the answer, which pleaded

the statute of limitations. Judgment was rendered for the plaintiff, and the defendant appeals.

The bond recited that the principal and surety were bound to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of section 1, chapter 183, of the Laws of 1909, and that if the principal should pay all claims which might be the basis of liens, and should pay all indebtedness incurred for labor and material furnished to erect the building, the bond should be void. The answer was that the bond was exacted under the law requiring a bond conditioned to pay all indebtedness incurred for labor or material furnished to erect the building; that the bond sued on was the only bond required; that the bond was duly filed in the office of the clerk of the district court; that the building was completed more than six months before the action was commenced, and hence the action was barred by the special statute of limitations contained in section 7570 of the General Statutes of 1915. The argument is that section 1, chapter 183, of the Laws of 1909, is permissive. The contractor may give the bond there provided for, and should he do so the bond takes the place of the security afforded by mechanics' liens. To such a bond the general statute of limitations applies. Section 7569 of the General Statutes of 1915 is mandatory, and requires public officials to take a bond conditioned for payment of all indebtedness incurred for labor and material furnished. The presumption is the mandate was observed. The allegations of the answer are that the bond was given as required by law, and no other bond was given. These allegations were admitted by the demurrer, and the special statute of limitations referred to must apply.

The terms of the bond could not be changed by allegations of the answer respecting its nature and purpose. The instrument speaks for itself. It was clearly a bond to supersede mechanics' liens. The answer does not charge that the plaintiff was not a party interested in such security, and consequently the special limitation applicable to suits on general bonds for the payment of labor and material debts does not apply. Probably the bond was sufficient to comply with section 7569 because of the added condition to pay all indebtedness incurred for labor and material. If so, the validity of the instru-

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ment for other purposes of security was not impaired. If not, the defendant cannot escape liability on this bond because another was not also taken.

The judgment of the district court is affirmed.

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No. 21,790.

THE STATE OF KANSAS, *ex rel.* S. M. BREWSTER, as Attorney-general, etc., *Plaintiff*, v. F. W. KNAPP, as State Auditor, etc., and WALTER L. PAYNE, as State Treasurer, etc., *Defendants*.

SYLLABUS BY THE COURT.

CONSTITUTIONAL LAW — *Enactment of Statute* — When "*House Concurrent Resolution*" May Become a Law. Under a constitution which provides that "no law shall be enacted except by bill," but which recognizes that a joint resolution passed by the senate and house of representatives may in some circumstances become a law, a proposition passed by both houses and approved by the governor may be regarded as a bill within the meaning of the provision quoted, where it has received the treatment of such a document and has every characteristic thereof except that it describes itself as a concurrent resolution, and contains the words "Be it resolved by the house of representatives of the state of Kansas, the senate concurring therein," instead of the constitutional formula for an enacting clause, "Be it enacted by the legislature of the state of Kansas."

Original proceeding in mandamus. Opinion filed March 9, 1918. Judgment for the plaintiff.

*S. M. Brewster*, attorney-general, for the plaintiff.

*F. W. Knapp*, and *Walter L. Payne*, *pro se*.

The opinion of the court was delivered by

MASON, J.: Merrell Gage has presented to the auditor a claim against the state for \$1,500 on account of a statue of Lincoln recently erected on the statehouse lawn, and has requested its allowance. The auditor, being in doubt as to the legal authority for the payment of the claim, has declined to approve it until the question shall have been judicially determined. For the purpose of such determination this proceeding has been brought, a mandamus being asked by the attorney-general, requiring the auditor to approve the claim

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and issue a warrant therefor, and the state treasurer to pay it. The case is submitted upon the pleadings. It is agreed that the plaintiff has done everything possible on his part to entitle him to the payment asked, and the only doubt in the matter is whether any valid appropriation has been made therefor. If so, it is by virtue of action of the legislature which is recorded as chapter 346 of the Laws of 1917, reading as follows:

**"HOUSE CONCURRENT RESOLUTION No. 25.**

**"RELATING to an appropriation for purchasing and aiding in the erection of the Merrell Gage statue of Abraham Lincoln upon the capitol square.**

**"WHEREAS, The sculptor, Merrell Gage, has produced an excellent statue of the great emancipator and typical American, Abraham Lincoln, the completed model of which is on exhibit at Mr. Gage's studio, 1027 Fillmore street, in the city of Topeka; and**

**"WHEREAS, Art critics, as well as persons who knew President Lincoln personally, declare the same to be an accurate and lifelike reproduction of President Lincoln; and,**

**"WHEREAS, The Woman's Club of the city of Topeka, and many other public spirited citizens of such city, have expressed the desire to have the statue erected on the capitol square, and have expressed a willingness to supply, or to procure the supply of by the city of Topeka, one-half of the cost of such statue and the erection thereof on the capitol square, provided the state of Kansas is willing to permit the same to be placed there, and to pay the other half for the cost and erection of such statue; therefore,**

***"Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein:***

**"SECTION 1.** That the sum of fifteen hundred dollars is hereby appropriated for the purpose of assisting in the purchase, erection and unveiling of a bronze statue of Abraham Lincoln, created by Merrell Gage, said statue to be erected and located upon the statehouse lawn or square, and at such place thereon as shall be designated by the Executive Council of the state, and the Executive Council are hereby authorized and empowered to permit the erection of said statue upon the statehouse lawn or square; provided, that the amount herein appropriated shall be in full of all claims or demands of every kind or character against the state; provided further, that said sum shall not be available or paid until the city of Topeka or the citizens of the city of Topeka shall have made provisions, in full, for the entire purchase price, erection and expenses incident to the unveiling of said statue; or, shall produce and file with the auditor of state a receipt in full from the said Merrell Gage together with a bill of sale transferring to the state of Kansas all of his right, title and interest in and to said statue;

and, also, a receipt or receipts showing that all expenses of every kind or character incident to the erection and unveiling of said statue has been fully paid and satisfied by the city of Topeka or the citizens of the city of Topeka.

"SEC. 2. That the auditor of state is directed to draw his warrants in favor of Merrell Gage for the sum and the purposes herein named, and upon his verified voucher therefor, accompanied by the receipt and bill of sale provided for in section 1 of this act.

"SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

"Approved [by the governor] March 3, 1917.

"Published in official state paper March 7, 1917."

Our constitution provides that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law" (art. 2, § 24), and that "no law shall be enacted except by bill" (art. 2, § 20). The same article of the constitution, however, recognizes that a law may be created by joint resolution. The section relating to the exercise of the veto power of the governor reads as follows, the last sentence having been added in 1904:

"Every bill and joint resolution passed by the house of representatives and senate shall, within two days thereafter, be signed by the presiding officers, and presented to the governor; if he approve, he shall sign it; but if not, he shall return it to the house of representatives, which shall enter the objections at large upon its journal and proceed to reconsider the same. If, after such reconsideration, two-thirds of the members elected shall agree to pass the bill or resolution, it shall be sent, with the objections, to the senate, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members elected, *it shall become a law*; but in all such cases the vote shall be taken by yeas and nays, and entered upon the journal of each house. If any bill shall not be returned within three days (Sundays excepted) after it shall have been presented to the governor, it shall become a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevent its return, in which case it shall not become a law. If any bill presented to the governor contains several items of appropriation of money, he may object to one or more of such items, while approving the other portion of the bill; in such case he shall append to the bill, at the time of signing it, a statement of the item or items to which he objects, and the reasons therefor, and shall transmit such statement, or a copy thereof, to the house of representatives, and any appropriation so objected to shall not take effect unless reconsidered and approved by two-thirds of the members elected to each house, and, if so reconsidered and approved, shall take effect and become a part of the bill, in which case the presiding officers of each house shall certify on such bill such fact of reconsideration and approval." [*Italics added.*] (Const. art. 2, § 14.)

This section as originally framed resembled the corresponding section in a number of state constitutions, as well as that of the federal constitution, but the phrase "and joint resolution" was new, although in Michigan the words "and concurrent resolution" were used (art. 4, § 14), and in Maine "or resolution having the force of law" (art. 4, § 2). The veto clause of the federal constitution is made applicable to "every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment)" (art. 1, § 7). The section quoted expressly declares that if a joint resolution which has been disapproved by the governor afterwards receives a two-thirds vote in each house "it shall become a law." The inference seems clear that a joint resolution which is approved by the governor after its adoption by the legislature thereby becomes a law, although this is not declared in so many words. If a law can be enacted only by bill, and a joint resolution may become a law, it would seem that a joint resolution must be a bill, or may in some instances be regarded as a bill. And such is said to be the congressional practice in this section of a well-known work which dates back to 1856:

"A form of legislation, which is in frequent use in this country, chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, is variously known, in our legislative assemblies, as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. In congress, a joint resolution, which is the name given in that body to this kind of legislation, is there regarded as a bill." (Cushing's Law and Practice of Legislative Assemblies, 2d ed., § 2403.)

Whether or not legislation may ordinarily be accomplished by means of the adoption of a proposition submitted in the form of a resolution, we conclude that the process used in the case now under consideration amounted to the enactment of a law by bill. While the instrument acted upon by the two houses and the governor described itself as a concurrent resolution, it had every characteristic, in form and treatment, of such a bill as by the combined action of the legislature and the governor becomes a law. It had a title which clearly expressed its subject to be the appropriation of money to pay for the Lincoln

statue. It was read on three separate days in each house. It contained a provision declaring that "this act" should take effect upon its publication. In each house it received the votes of a majority of the members elected, and the result of the roll call was entered in full on the journal. It was submitted to and approved by the governor, and published in the official state paper and in the statute book. "Joint resolutions," which may sometimes become laws, are required by the constitution to be adopted by a majority of the membership in each house (art. 2, § 13), by a recorded vote (art. 2, § 10), as well as to be approved by the governor, and "acts" of the legislature must take effect at a prescribed time, and be published (art. 2, § 19); but, save for these requirements, no mere resolution needs to have a title, to be read on three separate days, to show when it takes effect, to be adopted by a yea and nay vote entered on the journal, to be approved by the governor, or to be published. The treatment given this measure seems to show that it was regarded by the legislature and the governor as a "bill." It ought to be given effect as such, unless some insuperable obstacle is interposed. The fact that it is styled a concurrent resolution, rather than a joint resolution or bill, is not in itself especially important. It should be classified by its essential qualities rather than by what it happens to have been called. All that it lacks of the necessary characteristics of a bill is a literal compliance with the requirement that "The enacting clause of all laws shall be 'Be it enacted by the legislature of the state of Kansas.'" (Constitution, art. 2, § 20.) In lieu of this, however, it has one reading "Be it resolved by the house of representatives of the state of Kansas, the senate concurring therein." The courts are divided in opinion on the question whether a provision of the constitution prescribing a form of enacting clause is mandatory or directory. (Note, L. R. A. 1915 B, 1060-1063.) Those which consider it mandatory hold the entire absence of the clause to be fatal (same note, p. 1061), and such is the practice in this state. (*In re Swartz, Petitioner*, 47 Kan. 157, 27 Pac. 839.) But even where that rule obtains, a substantial compliance is all that is deemed necessary. (Note, L. R. A. 1915 B, 1061-1062.) The turning point in the present controversy is whether the words: "Be it resolved by the house of representatives of the state of Kansas,



the senate concurring therein," convey essentially the same meaning as "Be it enacted by the legislature of the state of Kansas." In a familiar case a conviction on a charge of felony was set aside because the word "the" was omitted from the concluding clause of an indictment, so that it read "against the peace and dignity of state" instead of "against the peace and dignity of *the* state." It was there conceded that a substantial conformity to the requirement of the constitution was all that was necessary, the court saying:

"It is plainly manifest that, the definite article 'the' which should immediately precede the word 'State' being omitted, the conclusion to the indictment in the case at bar falls far short of indicating the power or authority against which the facts charged in the body of the indictment constitute an offense. . . . It is clear that the omission of this word not only changes the sense but the very substance of the clause. . . . In the use of the definite article 'the' immediately preceding 'State' in the conclusion prescribed by the Constitution we have pointed out the State whose peace and dignity has been offended, and by the omission of such definite article we have a conclusion that does not designate the power or authority against which the offense is committed. . . . If this conclusion embraced language similar to that pointed out in the cases to which we have heretofore referred, such as 'against the peace and dignity of our said State,' or 'against the peace and dignity of State of Missouri,' it might be very properly ruled that such language was at least equivalent to the language prescribed by the Constitution, for the reason that it indicated the power and authority against which the offense as charged in the body of the indictment constitutes an offense." (*State v. Campbell*, 210 Mo. 202, 224, 225.)

Whatever may be thought of the application there made of the rule, the statement of the general principle is obviously sound—that the test to be applied is whether the language employed conveys the same meaning as the language prescribed. In the matter now under consideration, if the expression used had been "Be it *legislated* by the legislature of the state of Kansas," or "Be it enacted by the house of representatives and senate of the state of Kansas," it would hardly be doubted that the requirement of the constitution was substantially met. We think that the clause, "Be it resolved by the house of representatives of the state of Kansas, the senate concurring therein," unequivocally indicates that the two houses comprising the Kansas legislature unite in giving their approval to the sections which follow it, with the purpose to give them the effect which they purport to have, and that this

is all that could have been accomplished by a literal adherence to the formula employed by the constitution.

A requirement of the constitution that "The style of the laws of the state shall be, 'Be it enacted by the legislature of the state of Mississippi,'" was held to be met by the use of the word "resolved" in the place of "enacted," the court saying: "The word 'resolved' is as potent to declare the legislation with as the word 'enacted.'" (*Swann v. Buck*, 40 Miss. 268, 293.) That decision was followed, the language quoted being expressly approved, in *Smith v. Jennings*, 67 S. C. 324. In *May v. Rice, Auditor*, 91 Ind. 546, a joint resolution for the appropriation of money was held to be ineffective, but it was not in fact approved by the governor, and in the opinion stress was laid on the consideration that the constitution made no provision for the presentation of a joint resolution to the governor for his approval, the case of *Swann v. Buck*, *supra*, being distinguished on this ground and also upon a difference in the language of the provision regarding the enacting clause.

In at least two instances, the Kansas legislature has attempted to appropriate money by the adoption of a measure described as a joint resolution. (Laws of 1889, p. 421; Laws of 1891, p. 416.) It may be doubted whether either attempt was technically successful, for neither document contained any provision as to the time of its taking effect, or for its publication, although each was in fact published in the statute book. Here, however, inasmuch as we conclude that every requirement of the constitution has been substantially complied with, the result is a valid enactment.

Judgment is rendered in favor of the plaintiff, determining that the claim should be approved and a warrant issued and paid. The issuance of a writ will of course not be necessary.

MARSHALL, J. (dissenting): Neither the title to the resolution, nor its enacting clause, if it may be called such, pretends to say that what follows is intended to be a law. The title to every law, except one, enacted by the legislature in 1917 begins with the words, "An act." The one exception is chapter 91, the title to which, as printed in the statute book, begins with the words, "Relating to"; but on the back of the original bill the title reads: "An act relating to," etc. The constitutional requirement concerning the enacting clause was

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followed by the legislature, in 1917, in all instances when a law was being enacted. It is safe to say that every member of that legislature understood that both the title to an act and its enacting clause must give warning that what followed was intended to be a law. In the present instance, neither the title nor the enacting clause, nor both together, gave any such warning.

The constitutional requirement is simple. It is generally understood. It is easy to follow. There should be no refinements concerning it. Its simple requirements must be so obeyed, or they will cease to have any force or effect.

DAWSON, J. (dissenting): I cannot assent to the conclusions of the majority. The legislature will meet again in a few months and doubtless would pay the petitioner's claim in the regular way, by a specific appropriation made by law, as all other proper claims against the state are paid. A house concurrent resolution is not a law. The constitution takes no cognizance of such a resolution and does not define it. A resolution is a declaration of opinion, or the expression of a purpose—nothing more. In the Session Laws of 1917 are concurrent resolutions expressing the compliments of the house and senate to Hon. Charles F. Scott (ch. 339); expressing condolences on the death of Frank Edimer McFarland (ch. 345); requesting the Kansas senators and representatives in congress to vote for woman suffrage (ch. 351), etc. There are twenty-eight pages of concurrent resolutions in the Session Laws of 1913, the subject matter ranging all the way from memorials to the president on the high cost of living (ch. 341), to denunciations of "log rolling" and "pork barrel" raids on the national treasury (ch. 340). And the decision in this case raises all that sort of stuff to the dignity of legislation!

The constitution recognizes joint resolutions, but the resolution here under scrutiny does not pretend to be a joint resolution. What the constitution does say is that no money can be drawn out of the state treasury except pursuant to a specific appropriation made by law; and it says also that no law shall be enacted except by bill. (*In re Swartz, Petitioner*, 47 Kan. 157, 27 Pac. 839.) Again, the constitution says that every bill shall have an enacting clause, and that it shall plainly run like this: "Be it enacted by the legislature of the state of Kansas." Compliance with that provision of the con-

stitution is wanting in the resolution. The familiar, effective and summary way of killing a bill in the legislature is by striking out its enacting clause.

I know quite well that the spirit of our time is to give regard to the substance and not to the form of things. I trust I am in accord with that spirit; but disregard of fundamentals is not a true interpretation of that spirit. Every change does not necessarily lead to progress. There are a few plain, positive restrictions upon the delectable task of getting money out of the state treasury which the constitution requires to be observed, and which it will be mischievous to disregard. A resolution of the two houses of the legislature to appropriate money is merely a declaration of the house and senate that they intend to see to it that a law to that effect will be duly enacted. The student who cares to investigate this subject will find that the Kansas legislative custom is to follow up these resolutions to draw money from the state treasury with specific items of appropriation to that effect. These are usually inserted in the miscellaneous appropriation acts. For example, a senate concurrent resolution to appropriate \$6,000 for a statue of Governor Glick (Laws 1913, ch. 364) was followed by an item in the miscellaneous appropriation act to the same effect. (Laws 1913, ch. 60, item 34.) In discussing the necessity of following up this resolution with a corresponding item in the miscellaneous appropriation bill, the member from Atchison (Hon. J. W. Orr) said: "All the resolution amounts to is three cheers for Governor Glick." In 1903, the house concurrent resolution authorizing a statue of John J. Ingalls (House Journal, 1535, 1612; Senate Journal, 843, 844) was followed by a specific item appropriating \$6,000 in a formal act of the legislature. (Laws 1903, ch. 35, item 138.) See, also, Laws 1913, ch. 364; and Laws 1913, ch. 60, item 54. Such illustrations could be indefinitely extended.

Mandamus is a discretionary writ. It should seldom issue in any gravely debatable case. The courts, the legislature and the executive officers are all solemnly sworn to uphold and defend the constitution. If we are to have and maintain a constitutional government, we must stand by it, and not whittle it away so that it will mean nothing but a few glittering generalities.

WEST, J., joins in the dissent.

No. 21,011.

**HENRY W. WACKER, Appellee, v. MARK V. HESTER, Appellant,**

## SYLLABUS BY THE COURT.

**REAL-ESTATE AGENT — Purchaser Found — Contract Made — Commission Earned.** Rule followed, that a real-estate agent has earned his commission when he procures a purchaser ready, willing, and able to buy upon terms which the owner has accepted or agreed to accept.

Appeal from Kiowa district court; **LITTLETON M. DAY**, judge. Opinion filed April 6, 1918. Affirmed.

*R. F. Crick*, of Pratt, for the appellant.

*John W. Davis*, of Greensburg, for the appellee.

The opinion of the court was delivered by

**PORTER, J.:** This is an appeal from a judgment against the defendant for a real-estate agent's commission.

The defendant, who resides in California, owned a farm in Kansas, which he listed with plaintiff for sale, fixing the price at \$21,000, subject to a mortgage of \$7,500. On January 15, 1915, the plaintiff sent him the following telegram:

"Offered nineteen thousand dollars for land south of Joy. All cash except mortgage. Possession August first. Commission two hundred dollars. Wire answer my expense."

The defendant replied by wire refusing to take less than the original offer. The plaintiff then wrote him at length, advising that he accept the offer and asking him to reconsider and wire authority to let the land go at \$19,000. He received the following telegram in answer:

"Yes will sell nineteen thousand cash less seven thousand seven hundred. Mills lease is subject to sale possession any time. Buyer to settle with him. Three arbitrators if necessary. He is advised not to interfere again. He wrote he had done so. Send deed."

The plaintiff thereupon signed a sale contract with the purchaser, which he sent to the defendant January 27, and a few days later forwarded a deed for execution. On February 13, the defendant wired the plaintiff, "Sale off. Telegram offer and sale contract are very different"; to which the plaintiff replied by a telegram, insisting upon the contract being carried

out and upon his right to a commission. It appears that the party who agreed to purchase the land brought a suit against the defendant for specific performance of the contract, but failed to recover because of the lack of authority of the agent to execute a written contract binding the defendant. It developed on the trial of this case that a short time before the defendant sent the telegram declaring the transaction off he had received an offer of \$20,000 for the land. There was no substantial conflict in the evidence. The court found that the only objection the defendant made to completing the contract was that stated in his telegram, and that other grounds urged at the trial were therefore waived. The court found also that the telegram of January 27 fixed the terms of the sale and authorized the purchaser to make settlement with defendant's tenant. There is no ambiguity in the contract embraced in this telegram and the reply thereto, and the court properly determined the meaning of the writings. The fact that the land had been leased to a tenant prior to the date it was listed with the plaintiff was fully known on both sides, and the reply which the defendant sent to the telegram authorized the buyer to settle with the tenant. It is useless to contend that the contract made by defendant's agent did not comply with the original terms upon which the property was listed. The plaintiff found a purchaser who was ready, willing, and able to buy upon the terms which the owner accepted in the subsequent contract, and that is all he was required to do to earn his commission.

The judgment is affirmed.

No. 21,142.

THE STATE OF KANSAS, *Plaintiff*, v. THE INDEPENDENCE GAS COMPANY et al. (THE WYANDOTTE COUNTY GAS COMPANY, *Appellant*, JOHN M. LANDON, as Receiver, etc., et al., *Appellees*), *Defendants*.

No. 21,143.

THE STATE OF KANSAS, *Plaintiff*, v. THE INDEPENDENCE GAS COMPANY et al. (THE KANSAS CITY PIPE LINE COMPANY, *Appellant*, JOHN M. LANDON, as Receiver, etc., et al., *Appellees*), *Defendants*.

## SYLLABUS BY THE COURT.

1. QUO WARRANTO—*Action Dismissed—No Appeal within Six Months.* When an action is dismissed as to certain defendants, all orders which were made prior to the order of dismissal, and of which complaint is made by those defendants, must be appealed from within six months after the order of dismissal is made.
2. SAME—*Regulation of Rates of Natural Gas Companies—State Courts No Jurisdiction to Change Legal Rates.* The courts of this state have no jurisdiction to appoint receivers for the purpose of regulating the rates of public-service corporations, and neither the courts nor the receivers of such corporations have jurisdiction to change legal rates without the consent of the public utilities commission; but when the legal rates charged by the receiver of a public-service corporation have been enjoined by a court of competent jurisdiction, the receiver may put into effect rates to be charged until the commission establishes a new rate.
3. SAME—*Issues Disposed of by Stipulation.* An appeal may be dismissed when it appears that all the orders from which the appeal is taken were made under a stipulation signed by the party appealing.
4. SAME—*Appeal Dismissed.* An appeal may be dismissed when this court cannot make any order that will affect the rights of the parties thereto.

Appeals from Montgomery district court; THOMAS J. FLANNELLY, judge. Opinion filed April 6, 1918. Dismissed.

J. W. Dana, of Kansas City, Mo., for the appellants.

Chester I. Long, of Wichita, Robert Stone, of Topeka, T. S. Salathiel, of Independence, and John H. Atwood, of Kansas City, Mo., for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: On January 5, 1912, in the district court of Montgomery county, the attorney-general commenced an action in quo warranto against the Independence Gas Company, The Consolidated Gas, Oil, and Manufacturing Company, and the Kansas Natural Gas Company; and, in the petition in that action, charged that the defendants had violated the antitrust statutes of the state. The Kansas Natural Gas Company was then engaged in the transportation of natural gas through the eastern part of the state to the Wyandotte County Gas Company in Wyandotte county, and, in transporting the gas, used the pipe lines of the Kansas City Pipe Line Company. After the action had been commenced, the Wyandotte County Gas Company and the Kansas City Pipe Line Company were made parties thereto. The Wyandotte County Gas Company appeared specially and filed a motion to quash the service of the summons made on it. That motion was overruled. The Wyandotte County Gas Company and the Kansas City Pipe Line Company each filed a demurrer. The Demurrers were never heard by the court. Receivers were appointed for the Kansas Natural Gas Company, for the Wyandotte County Gas Company, and for the Kansas City Pipe Line Company. On October 16, 1915, the receivers for the Wyandotte County Gas Company were discharged, and the action was dismissed as to that company. No appeal was taken at that time, nor at any time within six months thereafter. On October 16, 1916, the court rendered the following judgment:

"It is therefore considered, adjudged and decreed that none of the distributing contracts aforesaid are binding upon, or effective against, said Receiver, and that he should not, and is hereby forbidden to, deliver natural gas to any of said distributing companies under the distributing contracts formerly existing between the Kansas Natural Gas Company and said distributing companies, respectively; and he is hereby ordered to deliver natural gas to such of said distributing companies as will receive the same at the rates and prices, and on the terms named in the schedule of rates and prices heretofore promulgated by said Receiver to said distributing companies, respectively; and the acts of said Receiver in promulgating said schedules are hereby approved."



From that judgment the Wyandotte County Gas Company and the Kansas City Pipe Line Company have filed separate appeals.

1. The Wyandotte County Gas Company contends that—

“The court below had no jurisdiction under Secs. 50 and 51 of the Code to summon The Wyandotte County Gas Company, a domestic corporation, domiciled, located, doing business and owning property only in Wyandotte County, to appear in the District Court of Montgomery County, in an action for the recovery of a fine, penalty or forfeiture imposed by statute.”

In the order discharging the receivers of, and dismissing the action against, the Wyandotte County Gas Company, there was a finding that all the pleadings charging or attempting to charge the Wyandotte County Gas Company with acts subjecting it to penalties had been withdrawn by stipulation. There was, therefore, no action pending against the Wyandotte County Gas Company on October 16, 1916; and there was then no petition charging that company with any act which would subject it to any penalty.

All errors that had been committed by the trial court against the Wyandotte County Gas Company were concluded by the judgment of dismissal against that company; and those errors cannot now be presented, for the reason that no appeal was taken within six months from the date of the dismissal. All questions concerning the service of summons, concerning the appointment of the receivers, and concerning their control and conduct until the order of dismissal, are concluded by the failure of the Wyandotte County Gas Company to appeal within six months after the date of that order.

2. The Wyandotte County Gas Company contends that the court had no jurisdiction to appoint receivers to regulate rates; that neither the court nor the receivers had jurisdiction to change the existing rates of the Kansas Natural Gas Company, or of the Wyandotte County Gas Company, without the consent of the public utilities commission; and that the court had no jurisdiction to disavow and cancel the supply contract existing between the Kansas Natural Gas Company and the Wyandotte County Gas Company.

The rate-making body of public-service corporations in this state is the public utilities commission. Under section 8358

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of the General Statutes of 1915, the rates charged by the Kansas Natural Gas Company and by the Wyandotte County Gas Company on January 1, 1911, became, and thereafter were, the legal rates; and those rates could not be changed without the consent of the public utilities commission. (*The State, ex rel., v. Gas Co.*, 88 Kan. 165, 127 Pac. 639; *The State, ex rel., v. Flannelly*, 96 Kan. 372, 152 Pac. 22; *Telephone Co. v. Utilities Commission*, 97 Kan. 136, 154 Pac. 262; *City of Scammon v. Gas Co.*, 98 Kan. 812, 160 Pac. 316; *The State, ex rel., v. Gas Co.*, 100 Kan. 593, 165 Pac. 1111.)

The order from which this appeal was taken was based partly on a conclusion of law—

“That the supply contracts with the distributing companies, whose plants are located within the State of Kansas, are invalid, illegal and void, being in violation of the laws of this state and of the United States, and are not binding on the Receiver.”

The validity of the contract between the Kansas Natural Gas Company and the Wyandotte County Gas Company is immaterial in these appeals, for the reason that the rates fixed by the contract were in effect on January 1, 1911, and became legal rates by virtue of section 8358 of the General Statutes of 1915. The trial court did not have power, in the action then pending before it, to declare those rates illegal. (*The State, ex rel., v. Flannelly*, 96 Kan. 372, 382, 152 Pac. 22.)

The court did not cancel the contracts; it found that the contracts were illegal and void, and stopped there. In this action, under the pleadings as they then stood, with the action dismissed as to the Wyandotte County Gas Company, the court did not have power or jurisdiction to cancel the contracts between that company and the Kansas Natural Gas Company. The court ordered the receiver of the Kansas Natural Gas Company not to deliver natural gas to any distributing company, except to such as would receive the same at the rates and prices that had been fixed by the receiver. The Wyandotte County Gas Company was distributing gas in Wyandotte county. Neither the court nor the receiver could compel that company to receive gas at any price other than the one named in the contract between the Wyandotte County Gas Company and the Kansas Natural Gas Company.

On December 10, 1915, the public utilities commission promulgated an order increasing the rates that had been established by section 8358 of the General Statutes of 1915. On June 3, 1916, in an action then pending in the United States district court for the district of Kansas, in which John M. Landon, receiver of the Kansas Natural Gas Company, was plaintiff, and the public utilities commission and others were defendants, a temporary injunction was issued enjoining the public utilities commission and its attorneys and the attorney-general from putting into effect and enforcing, by legal proceedings or otherwise, the rates established by law or those fixed by the public utilities commission. The injunction took effect on August 29, 1916. In *Telephone Co. v. Utilities Commission*, 97 Kan. 136, 154 Pac. 262, this court said:

"Where a court having jurisdiction determines that a rate fixed by the statute and approved by the utilities commission is confiscatory, the utility is left free to operate under such rate as it may establish until a new one has been fixed by the commission." (Syl. ¶ 5.)

When the federal court enjoined the rates that were in effect on January 1, 1911, and enjoined the rates that the public utilities commission put into effect on December 10, 1915, there were no legal rates that could be collected by the receiver of the Kansas Natural Gas Company. In order to serve the public, the receiver was then compelled to put into effect rates of his own; that he did. His rates were approved by the order from which these appeals have been taken.

The Wyandotte County Gas Company, in its specification of errors, presents other questions; but they are not argued in its brief and will not be discussed.

3. The appeal of the Kansas City Pipe Line Company is not identical with that of the Wyandotte County Gas Company. There is but one brief on the two appeals, and that brief presents the cause of the Wyandotte County Gas Company. The questions involved in the appeal of the Wyandotte County Gas Company have been disposed of, and, so far as the appeals are identical, the questions involved in the appeal of the Kansas City Pipe Line Company have also been disposed of.

The Kansas City Pipe Line Company, with a number of other parties to the action, entered into a stipulation which has been commonly called a creditors' agreement. Under that

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agreement, none of the matters of which the Kansas City Pipe Line Company complains can be modified or reversed, for the reason that its property has been operated and controlled by its receiver in conformity with the stipulation.

The action in the district court of Montgomery county has been dismissed, and the whole gas controversy is now in the federal court; and that court, through its receivers, has control of all the property connected with the Kansas Natural Gas Company.

4. John M. Landon, receiver of the Kansas Natural Gas Company, moves to dismiss these appeals. There is no substantial difference between the views herein expressed and the order made by the district court on October 16, 1916. Any order made at this time in this action cannot have any effect in the suits now pending in the federal court. The appeals are therefore dismissed.

DAWSON, J., not sitting.

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No. 21,169.

MELISSA THOMPSON, *Appellee and Appellant*, v. WILLIAM H. MILLIKIN, *Appellant and Appellee*, et al.

SYLLABUS BY THE COURT.

1. **HOMESTEAD—Conveyance Executed by Wife Alone—Void.** Upon the facts stated in the opinion it is held that the instruments relied on by the defendants, affecting the plaintiff's homestead, are void because executed by her alone, the husband not joining therein or consenting thereto.
2. **LIMITATION OF ACTIONS—Defendant's Absence from State.** The finding that on account of the defendant's absence from the state the plaintiff's action was not barred, held to be supported by the evidence.
3. **HOMESTEAD—Occupied by Family of Owner—Voluntary Absence of Husband.** The homestead provided for by the constitution is one occupied as a residence by the family of the owner. The title being in the wife, who remained in possession with her children, the homestead character of the property in question was not destroyed or impaired by the voluntary absence of the husband.
4. **SAME—Occupied by Wife and Children—Effect of Husband Acquiring Another Homestead in Oregon.** The fact that the husband entered and proved up on a homestead in Oregon, describing himself as single and unmarried—the law of that state requiring that a homestead be occupied only by some member of a family—did not of itself have the

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effect to deprive him of his husband's interest in the homestead occupied by the wife and children, so as to validate the instruments in question.

5. *SAME—Conveyance by Wife Alone—Estoppel.* Having in good faith explained to the grantees concerning the long absence of her husband, the plaintiff is not estopped, either by such instruments or by her conduct or acquiescence, from maintaining this action.
6. *APPEAL—No Merit in Cross Appeal.* The cross appeal of the plaintiff examined and found to present no substantial error.

Appeal from Chautauqua district court; ALLISON T. AYRES, judge. Opinion filed April 6, 1918. Affirmed.

*W. H. Sproul*, of Sedan, *George J. Benson*, and *T. A. Kramer*, both of El Dorado, for the appellant.

*J. B. Tomlinson*, *Charles D. Shukers*, both of Independence, and *H. E. Sadler*, of Memphis, Tenn., for the appellee.

The opinion of the court was delivered by

WEST, J.: From the findings of fact it appears that the plaintiff, with four children by her first husband, one by her second, and four by her third, resided on lots 7 and 8 of the land in question (a tax deed to lots 5 and 6 being acquired by her in 1897) with her husband, who in 1894 left, ostensibly to seek a new location. Correspondence ceased after a year and a half, and she heard nothing further from or of him until 1908, when she learned from a relative his post-office address and sent to him by registered mail some photographs of their children, receiving a registered receipt. The registered letter sent thereupon was returned uncalled for. She heard nothing further from him until 1915, when her attorney located him in British Columbia. She was in correspondence with relatives, some of whom knew her husband's address, from 1895 to 1904, but appears to have learned or attempted to learn nothing from them concerning his whereabouts. In 1903 she executed an oil and gas lease covering all of the land, to L. A. Lockwood, fully informing him as to the absence of her husband. In the same year Lockwood gave to Millikin an option for the purchase of the lease, and on the same day Millikin told the plaintiff he was negotiating for this purchase, and at his request she agreed to be at Sedan the next morning

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to see his attorney. This she did, and fully and frankly answered all the inquiries, stating in substance that she did not know where her husband was and had not heard from him for more than seven years; that they had had no trouble before he left, and that she knew of no reason why he should leave her. Millikin bought an assignment of the lease, informing Lockwood of what he had learned from the plaintiff touching the absence of her husband. In January, 1904, plaintiff executed a quitclaim deed for lots 5 and 6 to G. W. Goss for \$1,000, Goss being advised as to the absence of the husband and accepting the deed without his signature. He afterwards deeded to D. E. Rathbun, retaining an interest in the lease. In April, 1914, Rathbun by warranty deed acquired the rights of the patent holders, if any they had, to these lots and gave Millikin a lease thereof. In the summer of 1903 Millikin drilled a dry hole on lot 6 about 1,800 feet deep. Before November, 1904, he drilled and equipped eleven wells on the two lots, the equipment being removed before this action was begun. From these wells a large amount of oil was produced, amounting in value, while Millikin operated the property, to about \$57,000. During the first year of development and operation the fences were down, but at the opening of the pasture season of 1906 plaintiff repaired the fences and has ever since remained in the actual, open, notorious, hostile, and exclusive possession, except as interfered with by the pumping operations and the final junking of the property in 1909. She also kept the taxes paid, when not paid by some one else. March 1, 1900, the husband made a settlement on an Oregon homestead and lived thereon until 1901, making improvements, and on November 9, 1906, made final proof, receiving a patent on May 22, 1907. The statute of Oregon requires only that some member of the family shall reside upon the homestead. During all the operations on the land plaintiff was personally present, had knowledge thereof, made no objection thereto, and boarded some of the men in the employ of Millikin in such operations, and knew that he was expending a large sum of money therein. She never paid or tendered the repayment of the \$1,000 received by her for her deed to lots 5 and 6 of the land in question, nor did she ever question Rathbun's title or right of possession until about the time this suit was begun. In her reply she

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offered to repay or credit the \$1,000. It was expressly found that the plaintiff, the defendant and his assignee all acted in good faith.

The court reached the legal conclusion that sufficient inquiries were not made to justify a presumption that the husband was dead; that the land was the plaintiff's homestead, and its character as such was not destroyed or impaired by any act or declaration of her or her husband prior to the beginning of this action (June 6, 1910); that the plaintiff is not estopped; that owing to Millikin's absence from the state her action was not barred as to time; that she should recover a fair compensation for the oil taken from the land by Millikin before selling his interests in 1907; and that, considering the expense of production, one-tenth of the value of the oil, amounting to \$5,709.15 with interest, less a credit of the \$1,000, should be allowed her. The plaintiff was given judgment for \$6,415.45.

The defendant appeals, and urges that the land was not the plaintiff's homestead, because it was not the homestead of her husband who was the head of the family and who obtained another homestead in 1907; that the plaintiff is estopped by reason of her conduct; that the equities of the case are against her; that the action is barred; and that improper evidence was received touching the running of the statute of limitations.

We do not find any merit in the last point, and hence must hold that the finding of the court as to the bar of the statute was well supported.

The remaining questions to be considered are those of homestead and estoppel, the latter of these embracing the question of the equities of the case.

It is argued that the land is not the plaintiff's homestead, because the head of the family acquired another, and one family cannot have two homesteads at the same time. The land from which the oil was produced was that acquired by the plaintiff several years after her husband left, and was added to and became a part of the land on which she continued to reside with her nine children.

While it is true that one person or one family may not have two homesteads at one time, it is of importance to note that the homestead provision of our constitution relates to property

"occupied as a residence by the family of the owner." (Const. art. 15, § 9, Gen. Stat. 1915, § 261; Gen. Stat. 1915, § 3825.) Of course, it is ordinarily the duty of the wife to take her children and follow the husband when he desires to change the place of family residence, but here we have no evidence that he either requested or desired that the wife follow him to any new location. From the plaintiff's testimony, it appears that after the loss of her first husband and the divorce of the second she bought lots 7 and 8 and moved on the land with her children, and two or three years thereafter she married E. F. Thompson, and shortly after the birth of her fourth child by him he went away. He had frequently gone away for a while and come back. She testified that when he left he said that "he was going out west to hunt a home for us and when he got located that he would send for us." But he neglected to do so. During all the years of his absence the widow with her children occupied the land she had originally purchased and, after 1897, that which she acquired by tax deed, and it would certainly be a lamentable result if we were compelled to hold that this peripatetic husband could by such absence destroy the homestead character of the family residence. In *Koons v. Rittenhause*, 28 Kan. 359, it was said:

"In many states the homestead exemption is given to the owner who has a family, or to the head of the family; but in Kansas it is given with special reference to the family, and must be occupied by the family as a residence." (p. 363.)

In *Withers v. Love*, 72 Kan. 140, 83 Pac. 204, in deciding the homestead rights of a husband who, after his wife became insane, had been confined in the penitentiary, some of his children still remaining on the land, it was said:

"His voluntary absence would not constitute an abandonment while the homestead continued to be occupied by the family." (p. 150.)

The court repeated what was said in *Morris v. Ward*, 5 Kan. 239:

"The homestead was not intended for the play and sport of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society—to protect the family from destitution, and society from the danger of her citizens becoming paupers." (p. 151.)



Also, from *Helm v. Helm*, 11 Kan. 19:

"The occupation and enjoyment of the estate is secured to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home.'" (p. 151.)

Again, from *Chambers v. Cox*, 23 Kan. 393:

"Neither is the presence of both husband and wife essential to the existence of a homestead. Though one may have abandoned the other, yet either may have the children to care for and be the head of a family, and occupy a homestead.'" (p. 152.)

When this case was here before (93 Kan. 72, 143 Pac. 430) it was pointed out that in the syllabus in *Withers v. Love*, supra, it was ruled that—

"So long as the wife is living nothing the husband alone can do or suffer to be done will estop either of them from claiming the homestead.'" (p. 78.)

But we are confronted with the finding that the husband had obtained another homestead in another state, and 21 Cyc. 606 is quoted:

"If the debtor acquires a new domicile or homestead, he thereby loses his homestead rights in the former place of residence."

Also, *Savings Bank v. Wheeler's Adm'r*, 20 Kan. 625:

"This is on the theory, that a man or the head of a family can have but one homestead at the same time." (p. 630.)

The trouble about this argument is that it is not Eugene F. Thompson who is claiming a homestead right in this land, but the wife who remained there with her children and actually occupied it as a residence. But it is said that in all his Oregon land proceedings Thompson said he was a single man, and that "divorces are too easily obtained to make it necessary for him to have sworn falsely." It is urged that if his statements were true and he was a single man, then the plaintiff was no longer a married woman, and his signatures to the leases and deed were not necessary. But competent proof of his divorce is not before us. It is suggested that while an agent and the attorneys of the plaintiff found him and visited and talked with him, he was not produced, neither was his testimony taken. It might also be observed that the plaintiff did not evince very much solicitude about learning his whereabouts from his relatives, who could have given her

information. The one clear fact remains, however, that during the time covered by the transactions involved herein this land was the actual homestead of the plaintiff and her children. It was never abandoned as in *Shay v. Bevis*, 72 Kan. 208, 83 Pac. 202, and in most of the cases therein cited. A homestead cannot be alienated without the joint consent of husband and wife, while that relation exists, and that such relation has in this case ceased to exist has not been shown. Hence, so far as the homestead question is concerned there is nothing in the record to overturn the conclusion of the trial court in reference to the land in controversy.

It is forcibly argued that, the plaintiff having been personally cognizant of all the investments made upon the strength of her conveyances, and familiar with all the operations thereunder, and having received her price for the instruments she executed, she is equitably estopped now to demand anything further by way of consideration for the oil produced as a result of her lease and deed. To this it is responded that there was no intent to mislead, and that the grantees in the instruments dealt with their eyes open, having inquired of the plaintiff, who told them frankly, about her husband's long absence. The claim that she was defrauded was not supported, and the trial court, as already indicated, found that all parties acted in good faith. They were left, therefore, in the attitude of buying and selling instruments which were void under the constitution and statute, and, being void, could convey no rights, and, having no rights, the oil was taken by the defendant wrongfully, or at least without legal compensation. (*Withers v. Love*, 72 Kan. 140, 83 Pac. 204.)

The trial court deemed it equitable, in view of the expenditures made and the cost of production, to allow the plaintiff but one-tenth of the value of the oil produced by Millikin, and under the circumstances it is held that this ruling constituted no error of which the defendant can complain.

The plaintiff has filed a cross appeal and complains that the expense of drilling the dry hole was counted in fixing the amount to be allowed the plaintiff, and of the refusal to make additional findings and to grant a new trial. We have examined the record, and find no error covered by the cross appeal of which the plaintiff can justly complain.

The judgment is affirmed.

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WEST, J. (dissenting) : The plaintiff occupies the anomalous position of asking to recover for what she has already sold the defendant and been paid for. If she were presenting a question of homestead occupancy or right of possession, or even one for the cancellation of a lease or deed, the essential unfairness would not be so apparent. She voluntarily executed the conveyances, she received all she asked therefor, year after year she watched with full knowledge the investment of the defendant's capital on the strength of such conveyances, and, because the thing turned out more prosperously than was foreseen, she now seeks to make him pay her all the proceeds and has been given judgment for a portion thereof. When she executed the instruments she said, in effect and in equity, that, although they might be void in law, she would treat them as valid. During every day she watched the work she added to such agreement the weight of her acquiescence—a continuing reassurance to the defendant that she would keep her word.

Of course, the husband might return and sue, or she might die and the children sue, but, as for herself, the merest and commonest honesty should impel, as the courts should compel, her to keep faith.

Neither the doctrine of clean hands nor the decisions of this court hold out a reward under such circumstances. (*McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353; *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744; *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769; and especially *Shay v. Bevis*, 72 Kan. 208, 83 Pac. 202.)

In the former opinion (93 Kan. 72, 77, 143 Pac. 430) it was said :

“Upon a full trial of the facts in this case it may develop that the plaintiff is estopped by her conduct.”

That prophecy has, to my mind, become a reality.

DAWSON, J., dissents.

No. 21,170.

ELIAS DUNCAN, *Appellant*, v. THE BENTON & HOPKINS INVESTMENT COMPANY et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. JURISDICTION—*Transcript from Justice of Peace—Filed with Clerk of District Court of Another County—Execution Sale Without Jurisdiction.* Where a judgment is rendered by a justice of the peace of one county, and a transcript of the judgment is filed with the clerk of the district court of that county, and a copy of that transcript is filed with the clerk of the district court of another county, and an execution is issued thereon in the latter county, on which execution a sheriff's sale of real property is made, and the sale is confirmed, and the sheriff's deed is afterward issued, the execution, sheriff's sale, confirmation, and sheriff's deed are void, for the reason that the district court of the latter county is without any jurisdiction in the matter; and where the grantee in the sheriff's deed afterward conveys the real property to other parties, the execution, sale, confirmation, sheriff's deed, and subsequent conveyance may be attacked and set aside in an action brought for that purpose. A petition which alleges the facts above described states a cause of action.
2. SAME—*Sheriff's Sale—Void Execution.* An attempt to redeem real property from a sheriff's sale made under an execution that is void for want of jurisdiction in the court to issue the same, does not ratify the proceedings nor cure the defect in the jurisdiction.

Appeal from Sheridan district court; CHARLES I. SPARKS, judge. Opinion filed April 6, 1918. Reversed.

C. L. Thompson, of Hoxie, for the appellant.

A. C. T. Geiger, of Oberlin, and Robert W. Hemphill, of Norton, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: This action comes to this court on an appeal from a judgment sustaining the defendants' demurrer to the plaintiff's petition. The purpose of the action is to set aside the confirmation of a sheriff's sale, the sheriff's deed made under that sale, and other deeds subsequent thereto.

The plaintiff alleges that on February 7, 1914, he was the owner of certain described real property in Sheridan county, and that—

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"On the 7th day of February, 1914, W. J. Nichols, Sheriff of Sheridan County, Kansas, sold the above described real estate to the defendant, The Benton & Hopkins Investment Company for \$187.90, under authority of an execution issued out of the District Court of Sheridan County, Kansas, by virtue of a judgment entered in the District Court of Sheridan County, Kansas, upon a transcript from a Justice of the Peace Court in Decatur County, Kansas."

The plaintiff further alleges that the sale was confirmed on February 24, 1914; that a certificate of purchase was issued by the sheriff on February 26, 1914; that on September 21, 1914, the sheriff executed and delivered to the Benton & Hopkins Investment Company a sheriff's deed for the real property; and that on November 30, 1914, the Benton & Hopkins Investment Company executed a deed conveying the property to W. R. McCalla, jr., who afterward executed a deed to defendant Leora A. Wilcox, the wife of defendant Sherman Wilcox, the plaintiff's tenant. Sherman Wilcox was in possession of the real property under a lease which expired September 1, 1914.

The plaintiff charges that the Benton & Hopkins Investment Company and W. R. McCalla, jr., acted fraudulently in order to deprive the plaintiff of his title to the real property, and charges that Leora A. Wilcox was not the purchaser from W. R. McCalla, jr.; that, instead thereof, Sherman Wilcox was the purchaser; and that he was not an innocent purchaser of the property. The petition is not verified.

(1) A transcript of the judgment rendered by a justice of the peace may be filed in the office of the clerk of the district court of the county in which the judgment was rendered. Such judgment becomes a lien on the real estate of a judgment debtor, the same as if the judgment had been rendered by the district court. Execution may be issued on such judgment, and the same proceedings shall be had on the execution as if the judgment had been rendered in that court. (Civ. Code, §§ 517-519.)

"An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner

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as if rendered in the court of which he is clerk. Executions shall only be issued from the court in which the judgment is rendered." (Civ. Code, § 416.)

Although the petition does not so allege, it is assumed that a transcript of the judgment rendered by the justice of the peace was filed with the clerk of the district court of Decatur county, and that a copy thereof was filed in Sheridan county.

The district court of Sheridan county had no control over the judgment; it was without jurisdiction, and no execution could be issued from that county. While the sheriff of Sheridan county could sell the property under an execution issued from Decatur county, yet he must make his return to the clerk of the district court of the latter county, and the district court of that county must confirm or refuse to confirm the sale. (Civ. Code, §§ 469, 470.) There was no judgment in Sheridan county on which execution could issue. The execution and all proceedings under it were void for want of jurisdiction. The sheriff's deed was therefore void, and no subsequent deed depending on the sheriff's deed conveyed any title. The confirmation could have been set aside on a motion filed under section 598 of the code of civil procedure, but the plaintiff was not restricted to proceeding under that section. (*Steele v. Duncan*, 47 Kan. 511, 28 Pac. 206.)

(2) After the sheriff's deed had been issued, the plaintiff attempted to redeem the property from the sheriff's sale. The defendants argue that by that attempt the plaintiff waived the question of jurisdiction. That argument is without force. The plaintiff's attempt to redeem the land from the sheriff's sale did not ratify that sale nor confer jurisdiction on the district court of Sheridan county.

The petition states a cause of action. The judgment is reversed, and the district court is directed to overrule the demurrer and to proceed with the cause.

No 21,178.

**M. S. EVANS, Appellee, v. PIUS DIEHL, Appellant.****SYLLABUS BY THE COURT.**

1. **INJUNCTION—Drainage Ditch—Findings.** Findings of fact upon which a judgment enjoining the maintenance of a drain and ditch was based, examined, and no substantial conflict discerned therein.
2. **SURFACE WATER—Drainage Ditch—Depression—No Watercourse.** A depression in a plaintiff's land of lower elevation than a depression in defendant's land, and into which waters from defendant's depression flow in times of heavy rain, is not necessarily a natural watercourse into which the defendant may lawfully drain the waters from his depression under section 2 of chapter 175 of the Laws of 1911 (Gen. Stat. 1915, § 4051).
3. **SAME.** A depression into which surface and standing waters may be drained is not necessarily a natural watercourse merely because flood waters from a neighboring river find their way into that depression when the river is in flood.
4. **SAME—Findings of Trial Court Conclusive.** Where there is room for differences of opinion in the determination of an ultimate and controlling fact, the opinion and judgment of the trial court thereon is conclusive on appeal.
5. **SAME—Depression Not a Natural Watercourse—Injunction Allowed.** Defendant constructed a drain and ditch on his own land, in the natural course of drainage towards the land of plaintiff, which drain and ditch discharged their waters into a lower depression on plaintiff's land, but such lower depression was not a natural watercourse. *Held*, that such ditch and drain were not authorized by section 2 of chapter 175 of the Laws of 1911 (Gen. Stat. 1915, § 4051) nor otherwise, and were properly enjoined.

Appeal from Saline district court; DALLAS GROVER, judge.  
Opinion filed April 6, 1918. Affirmed.

*C. W. Burch, B. I. Litowich, and La Rue Royce*, all of Salina.  
for the appellant.

*Z. C. Millikin*, of Salina, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This is an appeal from a decree enjoining the defendant from maintaining a tile drain constructed by him to draw off surface and standing water from his own land,

and which cast it on neighboring land belonging to the plaintiff.

The lands of plaintiff and defendant lie in the west half of section 24, township 13 south, range 1 west, near the Solomon river in Saline county. The plaintiff's land lies north of defendant's, and they are separated by the right of way of the Rock Island railway, which runs in a northeasterly direction in that locality. There is a depression of an old river bed on plaintiff's land near the Solomon river, just north of the railway, but this depression does not drain into the Solomon, except when the latter is in flood, at which time the river overflows into plaintiff's depression and fills it; and if the river flood be high enough the water backs still further—through a culvert in the railway into a depression of another ancient river bed on defendant's land. The old river bed on defendant's land, more elevated than plaintiff's, is a swale where surface water accumulates to a depth of a few inches, perhaps two feet at the most. When more surface water than that amount accumulates, it starts to flow northeastward through defendant's land and through the railway culvert into the depression or old river bed in plaintiff's land. For the most part, the general lay of the land south of the railway, on defendant's land and for some distance west of it, is in a northeasterly direction. A ditch on the south side of the railway drains part of the surface water of that locality. This railway ditch empties through the railway culvert into plaintiff's old river bed. If the rainfall is unusual, this railway ditch overflows and its waters find their way towards defendant's land and into the depression thereon, and if their volume be sufficient such waters flow, with the other accumulated waters in that depression, over a slight natural ridge or barrier near the north side of defendant's land and through the railway culvert into plaintiff's land.

The drain and ditch enjoined in this lawsuit were constructed by defendant in the depression of his land and through this slight natural barrier to the railway ditch, and the waters of this drain and ditch are thus discharged into the railway ditch and thence through the railway culvert into the depression or old river bed in plaintiff's land. The drain is laid in the same general course taken by the waters when the



latter are high enough to flow. In ordinary years the plaintiff's depression is fit for farming and is farmed, notwithstanding the discharge of waters into it from the ordinary drainage of the railway ditch; but if it has to receive, in addition thereto, the waters which commonly stand in defendant's depression and which are held therein by the slight natural barrier at the north side of defendant's land, about eight or ten acres of plaintiff's land will ordinarily be rendered unfit for farming. Defendant's drain and ditch, if not enjoined, would make six or eight acres of his land fit for farming.

The trial court made extended findings of fact upon which it based its judgment enjoining the maintenance and use of defendant's drain; and it is the contention of defendant in this appeal that upon the facts found by the court the judgment should have been for defendant, and not for plaintiff.

The principal and only important issue in the case was whether the depression or old river bed in plaintiff's land was a natural watercourse for the outlet of surface and standing waters from defendant's land. (Laws 1911, ch. 175, § 2, Gen. Stat. 1915, § 4051; *Wood v. Brown*, 98 Kan. 597, 159 Pac. 396.) On this point the trial court's controlling findings are—

"1. . . . The north portion of this [plaintiff's] river bed is the shallowest and has an outlet into the [Solomon] river about fourteen feet above low water in the river. The deepest point in this [plaintiff's] river bed is . . . [near] the Rock Island track. . . .

"4. . . . The water falling upon the land south of the railroad and west of this culvert [16 feet wide and 10 feet high] . . . collects on the low lands and part of it follows the ditch on the south side of the grade of the Rock Island Railroad down through the culvert mentioned and through the same into the river bed upon plaintiff's land. . . . Some of it flows across the southeast quarter of section twenty-three [adjoining land west of defendant's] and into a low place and follows what is called a ravine through the south portion of the southeast quarter of section twenty-three into defendant's said depression or river bed, and, in the times of heavy and excessive rains, a portion of such water flows into said Rock Island ditch and thence under the railroad culvert mentioned, and into plaintiff's river bed. . . . In case of excessive and heavy rains the water following the south side of the railroad track overflows the railroad ditch into defendant's depression or river bed and follows the same in its course through the southeast quarter of section 23 around through defendant's land, a large part of it emptying into plaintiff's river bed. In times of excessive and heavy rains a large portion of the surface water which collects upon the land south of the Rock Island track and west from this culvert, for a distance

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of two miles through these different depressions, flows through the said culvert into plaintiff's river bed.

"9. In the years 1903, 1904, 1908, 1915, the Solomon river entered plaintiff's river bed from the north and backed through the railroad culvert and flowed into defendant's river bed or depression.

"11. Defendant's tile drain extends in about the same direction as the surface water flows in times of excessive rains and when such water is high enough to flow over the elevation at the north side of defendant's land. . . .

"14. The natural formation between plaintiff's land and defendant's land is such that without ditches no water will enter upon plaintiff's land from defendant's land until water has accumulated upon defendant's land to a depth of at least two feet, on account of a natural elevation or barrier on the north and northeast of defendant's land ranging in height from two to six feet.

"17. The years 1903, 1904, 1908, and 1915, as mentioned in finding numbered nine, are shown by the evidence to have been 'flood years,' the rain falling upon the territory drained by the Solomon river having been unusual and extraordinary.

"20. Defendant has no outlet for water flowing upon his land from the higher land west of it except through said culvert in the plaintiff's river bed.

"21. Plaintiff has no outlet for water flowing upon his land from defendant's land. [But see finding No. 1.]

"24. In order to construct his title drain it was necessary for the defendant to cut through a barrier or natural elevation about five feet high near the north line of his farm."

Defendant says that findings 14 and 24 concerning the "barrier" are inconsistent with every other finding made by the court. It is possible that the trial court miscalculated the height of the "barrier," but that is unimportant. Since the depression in defendant's land lies at a greater elevation than plaintiff's old river bed, a barrier of some height must intervene, otherwise the water would not stand in plaintiff's depression to any extent. But for some barrier, surface water would not accumulate to a depth of a few inches or up to two feet before it would flow without artificial tiling and drainage onto plaintiff's land. Moreover, no matter how high the barrier, since it was in defendant's own land, he might cut through that barrier if the water to be discharged thereby were carried into a natural watercourse. Section 2 of chapter 175 of the Laws of 1911, in part, reads:

"Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, whereby the water will be carried into some natural watercourse. . . . for the purpose

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of securing proper drainage to such land and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person, etc." (Gen. Stat. 1915, § 4051.)

The trial court found that the plaintiff's old river bed, into which defendant drains his land, is not a natural watercourse. Since there is no well-defined channel therein through which the waters can flow into some indisputable natural watercourse in that vicinity—like the Solomon river, for example—this court cannot disturb that finding unless the other findings are irreconcilable with that finding.

In *Wood v. Brown*, 98 Kan. 597, 159 Pac. 396, a natural watercourse was defined:

"Section 2 of chapter 175 of the Laws of 1911, permitting an owner of land to drain the same in the course of natural drainage by constructing open or closed drains whereby water will be carried into some natural watercourse, uses the term watercourse according to its previously accepted meaning which excluded depressions lacking the characteristic of a distinct channel cut in the soil by running water and having a bed and banks discernible by casual glance." (Syl.)

(See, also, *Palmer v. Waddell*, 22 Kan. 352; *Gibbs v. Williams*, 25 Kan. 214, syl. ¶ 2.)

In *C. K. & N. Rly. Co. v. Steck*, 51 Kan. 737, 741, 33 Pac. 601, it was said:

"But to constitute such a watercourse 'there must be a channel, a bed to the stream, and not merely low land, or a depression in the prairie over which water flows. It matters not what the width or depth may be, a watercourse implies a distinct channel, a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream.' (*Gibbs v. Williams*, 25 Kan. 214.)"

(See, also, *Rait v. Furrow*, 74 Kan. 101, 85 Pac. 934.)

This court can discern no substantial conflict in the findings. The findings that defendant's depression is higher than plaintiff's old river bed, that surplus waters occasioned by heavy rains flow in the general direction in which defendant's drain was laid, and that in times of extraordinary floods in the Solomon that river overflows into plaintiff's river bed and backs its waters through the railway culvert into defendant's depression, do not necessarily compel the conclusion that plaintiff's depression is a natural watercourse. Opinions on that proposition, on that ultimate fact, might differ; but since there is room for

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differences of opinion, the determination of the trial court must govern.

In *Perkins v. Accident Association*, 96 Kan. 553, 555, 152 Pac. 786, it was said:

"It can avail naught that this court might think the evidence rather meager to warrant that conclusion. This was a case where judges might entertain an honest difference of opinion, but the determination of the facts was strictly within the province of the trial court, and its finding is conclusive."

The court has not overlooked the authorities cited by defendant; but the finding that the plaintiff's river bed is not a watercourse forecloses all controversy as to the right of defendant to collect his surface and standing waters and, by drainage, to discharge them upon plaintiff's land.

Affirmed.

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No. 21,200.

THE EMERSON-BRANTINGHAM COMPANY, *Appellee*, v. JERRY LYONS AND W. D. GWIN, Partners, etc., *Appellants*.

SYLLABUS BY THE COURT.

1. **WRITTEN CONTRACT—Provisions for its Termination—Cannot Be Varied by Parol Evidence.** A written contract between a manufacturer of tractors and the distributors that either party might terminate the contract relation at any time by giving the other thirty days' notice in writing of his intention to do so, which is definite and complete, cannot be contradicted, altered, or added to by parol evidence of concurrent or prior negotiations or understandings.
2. **SAME—Sufficient Notice of Termination Given.** The notice given by one of the parties to the contract in question is held to be sufficient and effective to end the contract relation, and such party did not become liable to the other for damages through the exercise of the option provided for in the contract.
3. **WRITTEN ORDER—By Employee to Employer—Created No Liability against Employer.** A party may bind himself in writing to pay the debt of another and may make a binding promise to a debtor to pay his debt to a third person, but a written order by an employee to his employer to pay his creditor a sum of money out of the salary account of the employee does not create a liability against the employer and in favor of the creditor unless the employer agrees to honor the order or to make the payments.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed April 6, 1918. Affirmed.

*Ord Clingman*, of Lawrence, for the appellants.

*Edgar C. Ellis, Hale H. Cook, Raymond G. Barnett, and Roy K. Dietrick*, all of Kansas City, Mo., for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: The defendants were sued for the contract price of a farm tractor and upon an indebtedness due upon a second-hand tractor. As to the latter claim there is no controversy on this appeal. In answer to plaintiff's demand, defendants set up several counterclaims alleged to have arisen out of the breach by plaintiff of a written contract originally entered into by the defendants and the Gas Traction Company, to whose rights and liabilities the plaintiff has succeeded. These claims involved expenses incurred in reliance upon the contract, the value of their services up to the time of the alleged breach, and the consequent loss of profits. Another counterclaim was upon what is referred to as the Lang transaction. A demurrer to an answer was sustained, and this order was reversed. (*Emerson-Brantingham Co. v. Lyons*, 94 Kan. 567, 147 Pac. 58.) The case was afterward submitted to the court on the evidence, and no special findings were made. From the judgment in plaintiff's favor, defendants appeal.

Under the contract the defendants were appointed distributors of traction engines in Kansas and were to thoroughly canvass the state and sell the tractors at a retail price of \$2,800, while they were to receive them at a price of \$2,400 for the first ten tractors; for the next five, \$2,300; and for all over fifteen, \$2,250. The defendants were not authorized to conduct business or act in the name or on behalf of the company, and their appointment as distributors was "for a period of one year beginning April 1st, 1912, and ending March 31st, 1913, unless previously terminated, as hereinafter provided." The provision in the contract principally concerned in this appeal follows:

"It is mutually agreed that this contract may be terminated at any time either by the Company or distributors, giving thirty days' notice in writing to the other of their intention so to do."

Another provision in the contract was to the effect that if there was a failure of the defendants to accept an engine that

had been ordered, or to pay for it within thirty days after shipment, the company had the option to terminate the relationship upon giving defendants twenty days' notice in writing. The sale of its interest by the traction company to the plaintiff was consummated in August, 1912. In October, 1912, the plaintiff in a letter gave the defendants notice of its intention to terminate the contract in accordance with its terms, which was to take effect thirty days thereafter, and in it the company stated that if they had "deals pending which you expect to close within the near future, we will be glad to give them consideration and of course would expect to make it right with you."

In the trial, testimony was offered by the defendants tending to show that prior to and at the time of the execution of the written contract they were informed by the officers of the traction company that it was about to effect a sale to the plaintiff company, then about to be organized, adding that in case of sale defendants' contract would be protected and it probably could be renewed at the end of the year. The defendants contend that by the oral statements so made and the fact that they had faithfully performed their part of the contract, the company could not terminate it except for cause, and, that as no cause was stated or existed, the notice given was without effect. The plaintiff contends that the conditions under which the contract might be terminated, having been embodied in a writing, all prior and concurrent negotiations, if any were made, were without effect. The contract appears to be complete, and the stipulation in it respecting the right to terminate the relationship is definite, and hence it must be conclusively presumed that all of the undertakings of the parties as to termination are embraced in the writing. The general doctrine is that the terms of such a contract cannot be contradicted, altered, or added to by parol evidence of prior or concurrent negotiations or understandings. (*Milich v. Armour*, 60 Kan. 229, 56 Pac. 1; *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867; *Railway Co. v. Truskett*, 67 Kan. 26, 72 Pac. 562; *Van Fossan v. Gibbs*, 91 Kan. 866, 139 Pac. 174.)

The prior statements and understandings are wholly inconsistent with the written provision. To give force to them would be the substitution of a provision relating to the termina-

tion of the contract directly in conflict with the one deliberately placed in writing at the end of the negotiations. The stipulation allowing a termination may be drastic in its effect, but it was so specific as to leave no doubt as to its meaning, and it was one which was equally available to each of the contracting parties. When the transfer of the assets, rights, and liabilities of the Gas Traction Company was made to the plaintiff, it stepped into the shoes of the former and became entitled to exercise the option stipulated in the contract as fully as the latter might have done if no transfer had been made. The oral statements relied on are no more effective as a waiver of the stipulation than they were to contradict it, and nothing in the negotiations between the Gas Traction Company and the plaintiff for the transfer approaches a waiver of the provision.

A claim is made that the notice given was insufficient to terminate the relationship, in that the letter did not expressly give notice of termination of the contract nor state that it would end at a fixed time. In the letter the plaintiff stated:

"We wish to advise you herewith that it will be advisable for us in the future to work the territory direct and as per the terms of the contract, are notifying you thirty days in advance of our intention to terminate the contract."

In another part of the letter, after expressing appreciation of the loyalty of defendants, it was said that it was not with a feeling of dissatisfaction "that we serve notice on you relative to the cancellation of the contract within thirty days." The letter certainly carried information to the defendants of the intention of plaintiff to terminate the contract thirty days after the letter was written. Under the terms of the contract a notice of that intention for a period of thirty days was all that was required to end the relation, and defendants appear to have so interpreted the letter. Under the findings of the trial court there was no breach of the agreement by the plaintiff, and hence there was no basis for a claim for damages by reason of a breach.

The plaintiff expressed a willingness to pay, and the case appears to have been tried upon the theory that plaintiff should pay for anything done by the defendants to induce sales of tractors before the termination of the contract and which were subsequently completed by the plaintiff. It does not appear

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that any of the sales subsequently made within the state were the results of the efforts of the defendants, nor that they contributed in any way toward the making of such sales.

The Lang claim was based on a note given by Lang, which Jerry Lyons had signed as security and had been compelled to pay. Lyons obtained a writing from Lang, requesting the Gas Traction Company to pay Lyons \$50 per month for four months and to charge the same to his salary account, but no payments were ever made upon this request. Lang was an employee of the Gas Traction Company, but it does not appear that the company ever promised to pay the debt of Lang, nor that anything occurred which rendered it liable to pay the debt. A party may bind himself by writing to pay the debt of another, or he may make a binding promise to a debtor that he will pay his debt to a third person, but it does not appear that the Gas Traction Company or the plaintiff ever promised in writing or otherwise to pay the debt of Lyons. The request was left with the company for some time, but it appears that the account of Lang was always overdrawn, and perhaps that is the reason that no payments were ever made.

We find no error in the record, and therefore the judgment is affirmed.

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No. 21,231.

GERTRUDE E. MOON, as an Individual and as Administratrix, etc., *Appellee*, v. NANCY J. MOON and EDGAR L. MOON, *Appellants*.

## SYLLABUS BY THE COURT.

CONTRACT—*Interest in Land—Contract Without Consideration—Parol Evidence—Estoppel*. A contract signed by a mother and her two sons, Charles and Edgar, wherein it was stipulated that Charles owned a one-fourth interest in land, which the mother and Edgar agreed to purchase, considered, and held to be open to extrinsic evidence that the mother was sole owner of the land, that Charles had no interest in it, that the contract expressed a device whereby a gift to Charles was to be effected, and that the obligation to purchase apparently created on the part of the mother and Edgar was destitute of consideration.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed April 6, 1918. Reversed.



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*Eugene S. Quinton, of Topeka, for the appellants.*

*J. J. Schenck, of Topeka, for the appellee.*

The opinion of the court was delivered by

BURCH, J.: The action was one for specific performance of a contract to pay the purchase price of real estate. The plaintiff recovered, and the defendants appeal.

The defendant, Nancy J. Moon, is a widow. She had two sons, Charles Stewart Moon and Edgar L. Moon. Charles Stewart Moon is now deceased, and the plaintiff is his widow and administratrix. The contract sued on reads as follows:

"THIS AGREEMENT, Made and entered into this, the 22nd day of April, 1911, by and between Charles Stewart Moon and his wife, Gertrude E. Moon, parties of the first part, and Nancy J. Moon and Edgar L. Moon, parties of the second part,

"WITNESSETH: It is hereby stipulated and agreed and mutually understood that the said Nancy J. Moon is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in the northwest (N. W.) quarter ( $\frac{1}{4}$ ) of section sixteen (16), and the north-east quarter ( $\frac{1}{4}$ ) of section seventeen (17), township twelve (12), range fourteen (14), Shawnee county, state of Kansas; and that the said Edgar L. Moon is the owner of an undivided one-fourth ( $\frac{1}{4}$ ) interest in and to the said above described property, and that the said Charles Stewart Moon is the owner of an undivided one-fourth ( $\frac{1}{4}$ ) interest in said property; and that the said Charles Stewart Moon and Gertrude E. Moon, his wife, hereby agree to sell and convey by a good and sufficient warranty deed all their right, title and interest in and to the above described property to Nancy J. Moon and Edgar L. Moon for the sum of five thousand (\$5,000.00) dollars, without interest, to be paid on or before two (2) years from this date, subject to any mortgages or liens that may be now upon said property, possession of said property to be delivered during the life of this contract to the said Nancy J. Moon and Edgar L. Moon; and in consideration of the same the said Nancy J. Moon and Edgar L. Moon do hereby agree and promise to pay unto the said Charles Stewart Moon, or his heirs, the said five thousand (\$5,000.00) dollars, without interest, on or before two years from this date, for said interest.

"It being further agreed and understood that time shall be the essence of this contract, and that the said Nancy J. Moon and Edgar L. Moon shall well and truly perform and pay unto the said Charles Stewart Moon, or his heirs, said sum of five thousand (\$5,000.00) dollars, as herein provided, then said Charles Stewart Moon, and his wife, Gertrude E. Moon, will convey by a good and sufficient warranty deed all their right, title and interest in and to an undivided one-fourth ( $\frac{1}{4}$ ) of said property to Nancy J. Moon and Edgar L. Moon, otherwise this contract of sale shall be null and void."

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The answer was that the land was owned and occupied by Nancy J. Moon when the contract was made, that neither son had any property in the land, that the contract expressed a device by which a gift of \$5,000 to Charles Stewart Moon was to be effected, but which failed for want of funds, and that the obligation apparently created was destitute of consideration. The answer further contained much family history elucidating the situation, motives, and intent of the parties to this family transaction. On motion those portions of the answer were stricken out. At the trial the court refused to admit and struck out material evidence sustaining the portions of the answer left standing, and at the conclusion of the evidence for the defendants, who had the burden of proof, directed a verdict for the plaintiff.

The action of the trial court resulted from a misapplication of the parol-evidence rule. The contract was regarded as containing two parts: first, a written acknowledgment of title and possession in Charles Stewart Moon which could not be disputed, and second, a contract to purchase Charles Stewart Moon's land, the agreement to convey forming a valuable consideration for the agreement to pay the price. Regarding the contract as severable into distinct portions, as indicated, the portion wherein it was "stipulated and agreed and mutually understood" that the mother owned half the land and the sons one-fourth each, either created, modified, or extinguished property rights, or did not. If it did, it required a consideration to support it, and the defense of want of consideration was proper. If it did not accomplish a change in any subsisting right, it was merely an admission relating to facts independently existing and provable by independent evidence, and consequently was not conclusive. In this aspect the writing was simply a piece of evidence tending to show that Charles Stewart Moon was the owner of a one-fourth interest in the land and in possession of it. The proof offered by the defendants overcame this evidence, and established beyond controversy that he had no right, title, interest, or possession whatever, and that his mother was the sole owner.

The doctrine of estoppel is invoked by the plaintiff. The plaintiff is not an innocent purchaser, and asserts merely the right which her husband possessed. Why is a person estopped to deny a recital in a contract?

The old law was that a contract reduced to writing and sealed was the best evidence of the truth of its recitals. Estoppel was essentially a matter of evidence, and solemnity of form was the controlling consideration. This is no longer true. Estoppel is now a matter of substantive law, and a recital in a contract is not conclusive unless it operated as a representation or warranty inducing the formation of the contract, or was itself of the essence of the contract, or, having been accepted and acted on in good faith, resulted in consequences which it would be inequitable and unjust to disturb. A fair statement of the original doctrine, and of the modern view which regards the substance of the transaction and the situation of the parties to it, is found in Caspersz on Estoppel, fourth edition, sections 336 and 339:

"Estoppel by deed, or, as it may better be described, estoppel by matter in writing, rested originally upon the idea that written evidence was of a higher and more conclusive nature than verbal. The truth could better be established where the parties had agreed to bind themselves by an act of solemnity, such as the affixing of a seal to a formal document. The form of the contract was of the first importance; formal contracts could alone give rise to actions, and informal contracts were only enforced upon the grounds of necessity and convenience. Contracts under seal were, therefore, regarded as conclusive between the parties, the seal being a recognized and infallible method of proof.

"The tendency in modern times is to treat estoppel by deed as resting upon contract. So in *Carpenter v. Buller* [8 M. & W., 209, 212, (1841)], Baron Parke observed: 'If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument, it is not competent for the party bound to deny the recital; and a recital in an instrument not under seal may be such as to be conclusive to the same extent. . . . By his contract in the instrument itself, a party is assuredly bound and must fulfil it.' And in this view estoppel by deed is nothing more than estoppel by representation, and is founded upon representations as to existing facts. In order to ascertain whether an estoppel arises, it is therefore necessary to look to the general effect of the instrument, and to see what the precise representation is, and whether it has been acted upon. What has to be regarded is the substance of the transaction, and in particular the presence or absence of consideration." (pp. 316, 318.)

In this instance it is plain the recitals respecting division of ownership were not made to the deceased son to induce him

to sell what it was said he owned. The plaintiff did not plead that, relying on the recital respecting his ownership and possession, the deceased son so changed his situation that it would be unjust to return him to his former status, and the proof offered by the defendants precluded the possibility of an estoppel of this kind arising to confront them. Charles Stewart Moon had no land to sell or possession to give, could suffer no detriment in respect to land he did not own or occupy, and suffered no deprivation by failing to receive a gift prompted merely by maternal affection and generosity.

There remains the contract itself, considered as a contract, as an estoppel. If purely voluntary on the part of the persons sought to be held, it lacks engaging quality. Unless there were adjustment, or compromise, or settlement of doubtful or conflicting or unsettled claims respecting title and possession, mutual concessions or promises, or giving on one side and receiving on the other—unless there were consideration—there was no binding obligation. As a matter of fact, properly interpreted, the contract is a concatenated instrument, the various portions of which are dependent on each other, and consequently subject as an entirety to the defense of want of consideration.

The defendants were not harmed by the action of the court in striking out parts of the answer. The portions stricken out consisted chiefly of recitals of evidential facts. The defendants were harmed, however, when the court refused to admit and consider proof of such facts. All, or substantially all, of them were relevant to the issue—gift or contract resting on valid consideration.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

Sipe v. Sipe.

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No. 21,234.

CLARA S. SIPE, *Appellee*, v. JOHN B. SIPE, *Appellant*.

## SYLLABUS BY THE COURT.

1. **BENEFIT INSURANCE—*Agreement Not to Change Beneficiary—Payment of Assessments—Vested Rights.*** A vested interest in a certificate issued by a mutual benefit association may be created after its issuance, as well as at that time, by an agreement on the part of the member not to change the beneficiary, in consideration of the payment of assessments.
2. **SAME—*Agreement of Wife to Keep Up Payments—Not to Change Beneficiary—Substantial Performance.*** Where a wife agrees with her husband to keep up the payments on his certificate of membership in a mutual benefit association, which is payable to her on his death, in consideration of his promise not to change the beneficiary, substantial performance of the agreement on her part may be established, notwithstanding that a number of the subsequent assessments were paid by her husband's father, who had promised to pay them for her if she became unable to do so, she supposing that the payments were made by him because of his promise, although the fact was otherwise.
3. **SAME—*Wife to Keep Up Payments—Disposition of Proceeds of Certificate.*** Evidence that a member of a mutual benefit association told his wife that, in consideration of her paying the assessments, upon his death she should receive the proceeds of his certificate for herself and her children, does not necessarily imply that any legal claim thereto was intended to be given the children.
4. **SAME—*Jury in Advisory Capacity Only—Effect of Incompetent Evidence.*** The rule that a judgment will not be reversed for the admission of incompetent evidence, if there was other and competent evidence to the same point, unless it affirmatively appears that the improper evidence affected the result, applies where a jury is called, but acts only in an advisory capacity, as well as in cases tried without a jury.

Appeal from Jewell district court; RICHARD M. PICKLER, judge. Opinion filed April 6, 1918. Affirmed.

*Park B. Pulsifer, Charles L. Hunt, and Clyde L. Short*, all of Concordia, for the appellant.

*R. W. Turner, and D. F. Stanley*, both of Mankato, for the appellee.

The opinion of the court was delivered by

MASON, J.: In 1902, Seth C. Sipe became a member of the Modern Woodmen of America, receiving a beneficiary certificate for \$1,000, payable at his death to his wife, Clara S. Sipe. In November, 1915, he caused a new certificate to be issued to him in lieu of this, his father, John B. Sipe, being named as beneficiary. He died in April, 1916. His wife brought an action against the association, making her father-in-law a party, claiming the proceeds of the certificate on the ground that she had acquired by contract such a vested right under the original certificate as prevented a change of beneficiary without her consent, which had not been given. The association made no controversy, and paid the money into court for the benefit of whichever party should be found entitled to it. The case proceeded as one for the determination of the proper beneficiary. The plaintiff recovered, and the defendant, John B. Sipe, appeals.

The plaintiff pleaded, and produced evidence tending to show, these facts: in June, 1912, on the occasion of a visit to his home after he had been away for some months, having gone to Colorado for his health, her husband promised her that if she would keep up the payments he would never change the beneficiary, and that she should receive the proceeds of the certificate at his death; she made a number of payments, keeping them up for two or three years, from money earned by her in taking boarders and doing washing; in 1914 she had a conversation with the defendant in which he told her that whenever she could n't pay the assessments, he would do so for her; after this she paid some of them, but on a number of occasions when she went to make payment she found that the defendant had already done so.

1. It has already been determined by this court that—

"Where a husband agrees that if his wife will help to pay the assessments upon a certificate in a mutual benefit association in her favor he will not change the beneficiary, and in consequence of such agreement she makes a part of the payments thereon, using for the purpose what are in fact the proceeds of her own labor outside of her ordinary household duties, she cannot be displaced as such beneficiary without her consent." (*Savage v. Modern Woodmen*, 84 Kan. 63, syl. ¶ 3, 113 Pac. 802.)

The defendant undertakes to distinguish the present case on the ground that the agreement that the wife was to pay the assessments was made after the certificate had been held for some years instead of prior to or at the time of its issuance. There obviously can be no difference in principle based on that distinction. (29 Cyc. 128.)

2. The defendant maintains that the plaintiff is not entitled to recover, because she did not carry out in full her part of the agreement, this being shown by the fact that the defendant paid a number of assessments. The jury (which was acting in an advisory capacity only) found (1) that the defendant told the plaintiff that if she became unable to pay the assessments he would do so for her, (2) that she attempted to pay some of the assessments and found that he had already done so, (3) that she believed that he was doing this for her benefit, and (4) that these payments (or at least some of them) were made on account of his agreement with her to make them. The court approved the findings designated as 1 and 3. For that designated as 2 it substituted a finding that "the plaintiff went to see the clerk for the purpose of paying the assessments, and was informed that they had already been paid by John B. Sipe." In lieu of that designated as 4 it found that none of the payments was made by the defendant on account of his agreement with the plaintiff. We think the findings as finally adopted show a substantial compliance by the plaintiff with her agreement to keep up the assessments. When she undertook to make a payment and found that the defendant had already attended to the matter, she supposing this to have been done because of his promise to her, she was excused (so far as affected any controversy between herself and the defendant) from a literal compliance with her agreement. Granting that the defendant's promise was not legally enforceable, she had a right to assume that the doing of the act promised was in pursuance of the agreement, although as a matter of fact it turns out that it was not done by reason thereof. In these circumstances there would be no equity in decreeing that the interest she had already acquired in the certificate should be regarded as forfeited by reason of her accepting the benefit of his payments, which she naturally supposed were made in her behalf. The mere fact that the defendant paid a part of

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the assessments does not give him any equitable claim upon the proceeds of the certificate, beyond bare reimbursement, and that has not been asked.

3. A contention is made that there was a variance between the pleading and proof in that the allegation was that the plaintiff's husband promised that if she kept up the assessments she should receive the proceeds of the certificate, while her evidence was that he said the money was to go to her and her children. She testified that he told her that when he died she would receive the money for herself and the children. This was not a variance, nor did it tend to show that the children were necessary parties to the litigation. The essence of the agreement was that no change should be made in the certificate. The wife was the beneficiary, and the reference to her receiving the money for herself and the children did not imply that the latter were to have any legal claim to it.

4. The plaintiff was permitted to testify to her oral agreement with her husband with respect to the payment of the assessments, over an objection based upon the statute regarding evidence of transactions had personally with a person who has since died. (Gen. Stat. 1915, § 7222.) In the case already cited (*Savage v. Modern Woodmen*, 84 Kan. 63, 113 Pac. 802), in a similar situation, the statute was held not to apply. The reason given was that the adverse party was not "the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person," as the statute required. Since that decision the act has been amended, and now applies "where either party to the action claims to have acquired title, directly or indirectly from such deceased person." (Civ. Code, § 320.) It is suggested in behalf of the plaintiff that here the parties each claim to have acquired title from the association, and not from Seth C. Sipe. The plaintiff's claim to the money, however, is necessarily derived from her agreement with her husband, inasmuch as she was not mentioned in the new certificate, and is compelled to rely upon a contractual vested right which prevented a change of beneficiary. It is not necessary, however, to determine whether the testimony was competent, for there was other evidence of the making of the agreement, and we do not find anything in the record to indicate that the result would have



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been affected if the plaintiff's testimony regarding her conversation with her husband had been excluded.

Another witness testified that she had heard Seth C. Sipe tell the plaintiff that if she would keep up the insurance he would never change the beneficiary, and that a little later she had seen a letter which he had written his wife to the same effect. The plaintiff also testified to the receipt, the subsequent loss, and the contents of this letter. Her testimony as to the contents was objected to on the ground that it was "incompetent, irrelevant and immaterial, not within the issues or pleadings." In the brief, the objection urged is that the petition alleged an oral contract, and the effort to show one in writing was a material variance. No showing was made that the defendant was misled by the variance, as the statute requires in order for it to be deemed material (Gen. Stat. 1915, § 7026), and no such prejudice is apparent as to justify a reversal on that account. There are decisions to the effect that although a witness who is disqualified to testify concerning personal transactions with a person since deceased may testify to the receipt of a letter written by him, and also its loss, and the letter, if produced and identified, may be admitted, yet even if its loss is established the witness may not state its contents. (30 A. & E. Encycl. of L., 2d ed., 1036, 1037; 40 Cyc. 2325, 2328; Note, 21 Ann. Cas. 1216.) However, an objection to the testimony regarding the contents of the letter does not appear to have been urged on this ground.

The rule is established in this jurisdiction, in accordance with the great weight of authority elsewhere, that—

"A judgment rendered in a case heard without the intervention of a jury will not be reversed on account of the admission of incompetent evidence, unless the record discloses that there was no competent evidence to support it or in some other way shows affirmatively that the improper evidence affected the result." (*McCready v. Crane*, 74 Kan. 710, syl. ¶ 1, 88 Pac. 748.)

Where, as in the present case, a jury is called, but acts only in an advisory capacity, the same rule should apply, for the final and controlling decision is necessarily made by the trial judge on his own responsibility. This view is in accordance with the practice which regards as immaterial an erroneous instruction given in such a case, unless it shows a misconception of the law governing the ultimate rights of the parties.

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(*Hessen v. Sapp*, 98 Kan. 737, 160 Pac. 220.) We discover no cases in which it has been considered and rejected, and in several it has been distinctly adopted. (*Electric etc. Co. v. Safe Deposit etc. Co.*, 145 Cal. 124; *Halstead v. Coen*, 31 Ind. App. 302; *Welch v. Tippery*, 66 Neb. 640.)

Other rulings admitting evidence are complained of, but for the same reason it will be unnecessary to consider them. The contention is made that the decision reached is unjust and inequitable and contrary to the evidence. Upon the facts the conclusion of the trial court must control. It was shown that the defendant had expended \$1,701 for his son in the last five years of his life, and doubtless this was a reason for the attempt to make a change in the certificate for his benefit. The plaintiff's husband, however, seems to have been satisfied to have the original certificate stand until a few months before his death, and his obligation to his father, financial and otherwise, however great it may have been, does not constitute a controlling equity against his widow's claim to the insurance money.

The judgment is affirmed.

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No. 21,257.

HAMMOND L. MARSH, *Appellee*, v. E. J. VOTAW and RUTH VOTAW, *Appellants*.

SYLLABUS BY THE COURT.

**MORTGAGE FORECLOSURE—Irregularities in Decree—Motion to Set Aside Confirmation and to Amend Decree Made Too Late.** On September 25, 1913, in a foreclosure suit where the defendants were served with summons, judgment was entered by default, and with a provision barring defendants from all right of redemption. The sheriff's sale, at which the plaintiff purchased, was confirmed December 16, 1913, the decree of confirmation reciting that the mortgage was for purchase money, that less than one-third thereof had been paid, and fixed the period of redemption at six months from the sale. On September 23, 1916, the defendants moved to have the sale and confirmation set aside and the judgment modified, but stated no defense to the action, and made no offer to redeem. *Held*, that the original judgment, though erroneous, is not void; the error in the judgment could be taken advantage of only by appeal; other irregularities complained of were cured by the confirmation; and the defendants' application was made too late to entitle them to relief.

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Appeal from Butler district court; ALLISON T. AYRES, judge. Opinion filed April 6, 1918. Affirmed.

*Clarence Spooner*, of Newton, for the appellants.

*R. L. Holmes, Charles G. Yankey, W. E. Holmes*, all of Wichita, *B. R. Leydig, K. M. Geddes*, and *E. W. Grant*, all of El Dorado, for the appellee.

The opinion of the court was delivered by

PORTER, J: This is an appeal by the defendants from an order denying their motion to vacate an order of confirmation and to set aside the sheriff's sale and to amend the original decree in a foreclosure suit.

The defendants, E. J. Votaw and wife, were the owners of the land in controversy, and held the fee-simple title subject to a first mortgage of \$1,200, and the mortgage to the plaintiff amounting to \$3,700. The plaintiff commenced foreclosure on the 16th of April, 1913, and obtained service of summons on the defendants at their residence. They made no appearance, and on September 25, 1913, judgment of foreclosure was entered. An order of sale issued, and on December 2, 1913, the sheriff sold the property at public sale to the plaintiff for the sum of \$3,800, subject to the first mortgage. On the 16th day of December, 1913, the court confirmed the sale, the decree of confirmation reciting a finding that the mortgage was given for the purchase price, less than one-third of which had been paid, and upon these facts the court fixed the period of redemption at six months from the date of sale. On the 23d day of September, 1916, the defendants filed their motion to amend the decree, vacate the order of confirmation, and set aside the sheriff's sale. The hearing was had on the 20th day of December, 1916. As an explanation for the delay, the defendants allege that they moved to California shortly after the suit was commenced, that they did not return to Kansas until September, 1916, and then learned the facts in regard to the irregularities in the proceedings. The plaintiff suggests that about the time the defendants filed these proceedings the property had become exceedingly valuable, by reason of the discovery that it contains under it great quantities of oil and gas.

The principal objection to the original judgment is the re-

cital therein that from and after the sale the defendants were forever barred and foreclosed from all equity of redemption. It is obvious that the journal entry was drawn upon an old form in use before the statute of 1893 with respect to redemption was enacted. Of course, that part of the judgment was erroneous; but it was not void. (*Odgen v. Walters*, 12 Kan. 282.) There it was said that "the decree in the foreclosure suit in terms barred all right of redemption, and this was binding upon all parties and privies, even if erroneous, and cannot now be attacked collaterally." (p. 291.) To the same effect is *Ehrsam v. Smith*, 61 Kan. 699, 60 Pac. 740.

The decree of confirmation, after the usual recitals that an examination of the order of sale and the return showed the proceedings to be regular, contained a further finding that the mortgage was given for the purchase price of the property, less than one-third of which had been paid, and upon these facts the court fixed the period of redemption at six months from the date of the sale. It directed that if the property was not redeemed within six months the sheriff should convey to the purchaser. If the court's attention had been called to the erroneous recital in the original decree, doubtless the first journal entry would have been corrected. In view of the fact that almost three years elapsed from the time the decree was entered before the defendants raised their objections, we think the order made at the confirmation should be regarded as in effect a modification of the original decree. The law requires foreclosure sales to be confirmed, and the court retains jurisdiction over the subject matter and the parties until confirmation. The provision in section 503 of the code (Gen. Stat. 1915, § 7407) fixing the six-months period of redemption in case of foreclosure of the lien for the purchase price before one-third has been paid, does not require a recital of the facts either in the pleadings or the judgment.

It was held, however, in *Martin v. Miller*, 97 Kan. 723, 156 Pac. 709, that—

"The bidder at a judicial sale may properly look to the language of the judgment under which it is made for reliable information as to what he will get if his bid is accepted. The right to a deed and possession unless the property is redeemed within a year is quite a different thing from a right to a deed and possession unless redemption is made within eighteen months." (p. 725.)

In that case it was held that the proper method for the correction of a decree of foreclosure which unduly limits the right of redemption, where that is the result of inadvertence or misapprehension of the facts, is by motion under the statute relating to irregularities, and that the remedy is open to one purchasing the land, after the rendition of the judgment, from a defendant who was not personally liable for its payment. While the facts in that case were held not sufficient to authorize the court to disregard the terms of the original judgment and fix a different period of redemption, it was ruled:

"Although the trial court by liberality of construction might have treated a request made after sale, to fix the time of redemption at the statutory period, as a motion to correct the original judgment in that regard, the omission to do so in the present case held not to constitute error." (Syl. ¶ 4.)

The owner of the property against whom the default judgment had been rendered quitclaimed to Lewis, and it was said in the opinion:

"If the trial court had treated Lewis' request as a motion to modify the judgment, and upon a finding of inadvertence or irregularity had changed the period of redemption as there fixed, from twelve months to eighteen, its action in that regard would have been unassailable." (p. 726.)

In *Neef v. Harrell*, 82 Kan. 554, 109 Pac. 188, the judgment, while indicating that the sale was to be made subject to the statutory right of redemption, failed to specify the time of redemption. At the confirmation plaintiff made a showing that the mortgage was given for purchase money, and that a third of this had not been paid, but the court refused to limit redemption to six months and fixed the period at eighteen months. On appeal the judgment was modified.

In *Hines v. Kays*, 93 Kan. 209, 144 Pac. 240, the petition alleged the mortgage was given for part of the purchase price, but no evidence was offered in support of the claim. At the confirmation, upon evidence showing these facts, the court fixed the period of redemption accordingly, and the practice was approved.

The judgment was erroneous but not void, and if it be conceded that the error was not cured by the subsequent provisions of the decree of confirmation, still the defendants are bound by the judgment, since the only way in which they could take ad-

vantage of the error was by appeal. (*Ogden v. Walters*, supra; *Ehrsam v. Smith*, supra; *Mills v. Ralston*, 10 Kan. 206.) The several irregularities in the sheriff's return, of which complaint is made, are not available to defendants, because they were all cured by the confirmation. (*Thompson v. Burge*, 60 Kan. 549, 57 Pac. 110; *Hill v. Gatliff*, 69 Kan. 179, 76 Pac. 428.) Besides, they are unsubstantial. Although the holder of the first mortgage was not a party to the foreclosure, it was proper for the sheriff to sell the land subject to the first mortgage. Its validity was not in question. The return of the sheriff recited that he had caused a "notice of the said property" to be published. A part of the return consisted of a copy of the published notice, from which it appeared to be the usual notice of a sheriff's sale. To the return there was attached the publisher's affidavit showing that the publication complied in all respects with the statute. It is too late for the defendants to complain that the court received no evidence on which to base the findings in the decree of confirmation; and their contention that the decree of confirmation is void, and that the court had no jurisdiction to make it, is without merit. The order of sale directed that the proceeds be brought into court to abide the further order of the court. There was no inconsistency between this and the provisions of the original decree providing specifically how the proceeds should be applied.

There are no equities which entitled defendants to have the sale set aside. They were obviously guilty of laches in waiting almost three years after the sale and confirmation before seeking relief. Under the provision of the decree of confirmation they had six months in which to redeem; and if they had been entitled to the full period of eighteen months' redemption, that had long since expired. Without offering in their application to redeem from the indebtedness represented by the judgment, and without any suggestion of a defense to the action, they rely apparently on their right to speculate upon the advancing value of the property, while permitting the judgment and sale to stand without objection until long after their rights of redemption would have expired if the judgment had been properly entered.

The order denying the motion is affirmed.

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No. 21,338.

THE STATE OF KANSAS, *ex rel.* S. M. BREWSTER, as Attorney-general, etc., *Plaintiff*, v. CAREY J. WILSON, as Superintendent of Insurance of the State of Kansas, et al., *Defendants*.

## SYLLABUS BY THE COURT.

**INSURANCE COMPANIES — State Tax upon Premiums Received — Proper Method of Computation.** The annual state tax of two per cent upon all premiums received by foreign insurance companies on account of their yearly business in this state, imposed by sections 5177, 5467 and 5468 of the General Statutes of 1915, should be computed upon the total amount of premiums collected, retained and devoted to the business of the insurance companies, but any surplus of premiums not so used, but returned to the policyholders or credited to them as abatements or dividends, should be excluded from the computation.

Original proceeding in mandamus. Opinion filed April 6, 1918. Writ denied.

*S. M. Brewster*, attorney-general, *John L. Hunt*, and *S. N. Hawkes*, assistant attorneys-general, for the plaintiff.

*Robert Stone*, *George T. McDermott*, and *H. O. Caster*, all of Topeka, for the defendant; *John Barnes*, of Milwaukee, Wis., *F. G. Dunham*, *William J. Tully*, both of New York, N. Y., and *William C. Craige*, of Philadelphia, Pa., of counsel.

The opinion of the court was delivered by

DAWSON, J.: This is an original action to secure an authoritative interpretation of a statute relating to the taxation of insurance companies. It takes the form of mandamus to require the superintendent of insurance to pay into the state treasury certain moneys exacted by him from the defendant insurance companies, over their protest, pursuant to a debatable construction of section 5467 of the General Statutes of 1915, which reads:

"Every insurance, guaranty and accident company or association not organized under the laws of this state shall, as hereinafter provided, annually pay a state tax upon all premiums received, whether in cash or in notes, in this state, or on account of business done in this state, for insurance of life, property or interests in this state, or guaranty companies, at the rate of two per cent per annum, which amount of tax shall

be assessed by the superintendent of the insurance department, as hereinafter provided."

Other related provisions of statute read:

"Every such company or association shall, on or before the 15th day of January in each year, make a return, verified by the affidavit of its president and secretary or other chief officers, to the superintendent of the insurance department, stating the amount of all premiums received by said company, whether in cash or notes, in this state, during the year ending on the 31st day of December next preceding. Upon receipt of such returns the superintendent of the insurance department shall verify the same, and assess the taxes upon the various companies on the basis and at the rate provided for in section 1 of this act, and proceed to collect the same from the insurance companies and cover the same into the state treasury." (Gen. Stat. 1915, § 5468.)

" . . . All insurance companies, partnerships and associations organized under any foreign government engaged in the transaction of the business of insurance in this state, as provided for in this act, shall annually, on or before the first day of March in each year, pay to the superintendent of insurance two per cent on all premiums received in cash or otherwise by their attorneys or agents in this state during the year ending on the preceding thirty-first day of December, which sum shall be paid, in addition to its other license fees, into the state treasury for the insurance fund. . . ." (Gen. Stat. 1915, § 5177.)

In his answer and return to the alternative writ, the superintendent of insurance says he merely awaits the court's direction and protection in the discharge of his duty. The real defense is made by the insurance companies. Their several answers only differ in details; their main contentions are alike. They say they have no quarrel with the statute, and that pursuant to its terms they pay to the state many thousands of dollars annually; but they claim that the computation of the precise sums due from them is made incorrectly. In substance, each company says it pays the two per cent tax willingly upon the net annual premiums exacted from its policyholders which are retained and used by the company, but each protests against the payment of the tax upon the surplus of the premiums which it returns to the policyholders when it develops at the close of the year's business that a surplus or overcharge of premiums has been collected which is not necessary to the financial demands of the company. One of the defendants illustrates the point thus: To insure its solvency its financial policy has three main factors of safety. First, it assumes that



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its death losses will be higher than the mortality tables of human experience commonly disclose; second, it assumes that its expense of administration, taxation, etc., will be higher than past experience would suggest; and third, that its income from assets, capital, reserves, and the like, will be less than past experience would suggest. On this broad leeway of assumptions, sometimes called "the loading," it fixes the premiums to be exacted from its policyholders, and its contracts of insurance so provide. But when at the close of the year's business it is disclosed that these broad precautions of safety were not necessary, that its business for the year has been normal, and that consequently the exaction of the full amount of premiums contracted for and collected was not necessary, it refunds or abates to its policyholders a part of the premiums—such part as it can spare without injury to its financial safety. It is the state's right to tax such returned or abated portions of the premium moneys which is questioned.

Another of defendants illustrates its contention by exhibiting a table relating to its account with one of its policyholders, whose stipulated premium was \$609 per annum. Each year, after the first, part of his premium was returned to him as an abatement, commonly, but not quite accurately, designated as a "dividend." This table reads:

| "Year.    | Prem.<br>stipulated<br>in policy. | Dividend. | Amt.<br>paid to<br>company. | Amt.<br>reported<br>subject to tax. |
|-----------|-----------------------------------|-----------|-----------------------------|-------------------------------------|
| 1912..... | \$609.00                          | None.     | \$609.00                    | \$609.00                            |
| 1913..... | 609.00                            | \$111.70  | 497.30                      | 497.30                              |
| 1914..... | 609.00                            | 118.40    | 490.60                      | 490.60                              |
| 1915..... | 609.00                            | 125.10    | 483.90                      | 483.90                              |
| 1916..... | 609.00                            | 132.00    | 477.00                      | 477.00                              |
| 1917..... | 609.00                            | 139.10    | 469.90                      | 469.90"                             |

The question in this case, as applied to the policy in the table submitted, is whether the state's two per cent tax on premiums shall be exacted each year on the sum of \$609, the stipulated premium which the company has the right to collect and the right to keep, or upon that amount less the dividend or abatement to the policyholder when, at the conclusion of the business of the year in which it was collected, it was disclosed that the company's financial condition did not require its retention?

With almost an entire unanimity the courts which have had occasion to consider this question have determined that the tax only reaches the sum retained and kept for the company's business and does not apply to such portion of the sum as is returned to the policyholder or abated to his account. Some of the pertinent decisions are: *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. 199; 201 Fed. 918; *Connecticut General Life Ins. Co. v. Eaton*, 218 Fed. 188; 223 Fed. 1022; *Mutual Benefit Life Ins. Co. v. Commonwealth*, 128 Ky. 174; *N. Y. Life Ins. Co. v. Chaves*, *Supt. of Ins.*, 21 N. M. 264, 153 Pac. 303; *Com. of Pa., Appellant, v. Penn. Mut. L. Ins. Co.*, 252 Pa. St. 512; *Com., Appellant, v. Metropolitan L. Ins. Co.*, 254 Pa. St. 510; *New York Life Insur. Co. v. Styles*, 59 Law J. Rep. Q. B., 291.

The case of *German All. Ins. Co. v. Van Cleave*, 191 Ill. 410, is to the same effect, although it related only to the tax on fire insurance premiums.

The case of *Metropolitan Life Ins. Co. v. State*, (Ind.) 116 N. E. 579, is largely at variance with the prevailing view of the cases cited above. The court has examined all these cases, but it would unduly extend this opinion to quote from them.

It is a prudent policy which for the time being exacts from the policyholder somewhat more than the estimated amount needed to pay the proper charges on an insurance business. The inherent uncertainties of any business commend such foresight. But neither the insurance company nor its patrons should be penalized for so doing; and moneys received as premiums but returned because not necessary for premiums should not be taxed as such. True it is that—

“He who hopes a faultless tax to see

Hopes what ne'er was, nor is, nor e'er shall be.”

But legislatures do not purposely intend to impose irrational, illogical, or unjust burdens of taxation. Statutory language imposing an exceptional or irrational burden of taxation should be so clear and unambiguous as to leave no room for debatable interpretations. It cannot be presumed that the legislature intended that the collection or noncollection of the premium tax should be governed by a question of bookkeeping, nor on an undue significance to mere words of terminology.

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In the answers of the defendant insurance companies, the truth of which are admitted by the pleadings, the moneys upon which the right of taxation is disputed are variously designated as abatements, dividends, surplus, rebates, refunds, excess of tentative or experimental premiums, excess of gross or estimated premiums over net or mathematical premiums, overcharge of premium, difference between estimated premiums and actual cost of insurance, difference between level premium and adjusted losses and costs afterwards determined. The court holds that such moneys not actually devoted as premiums to the business of the insurance company for the current year in which they are collected, but which are returned or otherwise abated or credited to the policyholders' account, are not subject to the two per cent tax exacted upon premiums received during the year under sections 5177 and 5467 of the General Statutes of 1915.

A special question is raised concerning the premium collections of the defendant Metropolitan Life Insurance Company. This company issues industrial policies, calling for payments of a few cents each week. It employs agents at considerable expense to collect these small items. To lessen this expense, its contracts provide that if the policyholder will remit his payments promptly and regularly for one year, an abatement of ten per cent will be awarded him, that being about the cost of collection. This situation is governed by the general rule which we have considered. If the full payments received are retained, the tax thereon should be paid; where it is not retained, but returned or abated to the policyholder's account, the tax is not due thereon.

As to all the defendants, they should pay the tax upon the total sum of premiums which they receive and retain, but the statute does not require them to pay upon the refunded or abated surplus or excess of premiums which is not thus retained.

Writ denied.

No. 21,355.

**RICHARD J. CONROY, Appellant, v. THE GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN, Appellee.****SYLLABUS BY THE COURT.**

1. **BENEFIT INSURANCE—Claim First to be Presented to Tribunal Designated by Association.** It is competent for a mutual benefit association to require that claims against it upon its certificates shall be submitted in the first instance to a tribunal designated by it, and that the remedy so provided shall be exhausted before recourse is had to the courts.
2. **SAME—Nonpayment of Dues—Forfeiture—Custom.** In order for a member of a mutual benefit association who, according to the terms of his certificate, has lost his rights thereunder by a failure to make a payment of dues at the time specified, to avoid such forfeiture by reason of a reliance upon an established practice of accepting delinquent payments within a definite period after the default, he must show an offer to make payment within the limit as so extended.
3. **SAME—Rule Not Changed by Entry of Record of Forfeiture or Expulsion.** Where, notwithstanding a written rule that a loss of membership in a mutual benefit association results automatically from the failure to pay dues before the first of the month, a practice has been established of accepting them if offered before the sixth, the entry on the records that the expulsion of a member has resulted from his failure to make payment, followed by a notice given him to that effect between the second and the fifth, does not excuse an omission on his part to offer the money before the sixth, if he is to rely upon the extension of time growing out of the practice.
4. **SAME—Nonpayment of Dues—Expulsion—No Waiver by Reason of Clerical Error in Notice.** Where the expulsion of a member of a mutual benefit association has resulted from his failure to pay his December dues within the prescribed time, and proper entries of the fact have been made upon the records, the association is not precluded from relying upon such expulsion as a defense to a claim made by him, by the unintentional error of a general officer in referring to the expulsion as having taken place in October, in a letter denying liability on account thereof.

Appeal from Crawford district court; ANDREW J. CURRAN, judge. Opinion filed April 6, 1918. Affirmed.

John P. Curran, C. S. Denison, and John L. Kirkpatrick, all of Pittsburg, for the appellant.

B. S. Gaitskill, of Girard, for the appellee.

The opinion of the court was delivered by

MASON, J.: Richard J. Conroy brought an action against the Grand Lodge of the Brotherhood of Railroad Trainmen, alleging that on January 24, 1915, while a member of that organization, he received an injury which entitled him to the payment of \$1,500, according to the terms of a beneficiary certificate held by him. A trial was had without a jury. Judgment was rendered for the defendant, and the plaintiff appeals.

No special findings were made or asked. The language of the judgment shows that special reliance was placed upon the fact that the claim was based upon injuries of a character that made the defendant's obligation qualified rather than absolute, but, because of the general finding against the plaintiff, any conflicts in the evidence must be resolved in favor of the defendant. There is little controversy, however, over the facts.

The rights of the holder of a certificate issued by the defendant are defined by its constitution. It provides that upon proof being furnished that a member has received an injury of a certain kind, described as constituting total and permanent disability, such as the loss of a hand or foot, or of both eyes, he shall be paid the amount named in his certificate. Such an injury as that suffered by the plaintiff, however, is provided for in what is designated as section 70, reading as follows:

"All claims for disability not coming within the provision of Section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood, and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to the Beneficiary Board, composed of the President, Assistant to the President and General Secretary and Treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and if approved by said Board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said Board shall be required as a condition precedent to the right of any such claimant to benefits hereunder and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said Board in any case; but the General Secretary and Treasurer shall report all disapproved claims made under this section to the Board of Insurance at its next annual meeting for such disposition as such Board of Insurance shall deem just and proper."

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The constitution also contains these provisions, which may have some bearing on the case:

"All right of action upon beneficiary certificates shall be absolutely barred, unless proofs of death or total and permanent disability shall be forwarded to General Secretary and Treasurer, as hereinafter required, within six months after such death or disability occurs.

"A member desiring to present a claim under Section 70 shall petition his lodge in writing upon the form provided by the General Secretary and Treasurer; said form must be properly executed by the claimant, and a regular practicing physician or surgeon, showing the condition of the brother and the basis of his claim. If approved by the lodge, the secretary shall forthwith forward them with notice of such approval to the General Secretary and Treasurer, who will at once forward to the lodge necessary blanks and instructions for presenting a claim.

"No suit or action at law or equity shall ever be commenced upon any beneficiary certificate by any claimant until after such claimant by appeal has exhausted all remedies provided for in this Constitution, within the time allowed by this Constitution.

"Payment of death and total and permanent disability claims and claims addressed to the systematic benevolence of the Brotherhood, shall be made from the proceeds of the beneficiary assessments on which such claims appear."

1. Assuming that the allowance and payment of meritorious claims under section 70 is obligatory, and not merely optional, it is clear that the intention is to require the claimant to submit his demand, in the first instance at least, to the tribunal there provided. Whether or not any part of the rules quoted may be objectionable as an effort to oust courts of their jurisdiction, it is competent for the association to compel its members to exhaust the remedies which it has provided, before having recourse to litigation. (19 R. C. L. 1226-1228; *Supreme Lodge v. Raymond*, 57 Kan. 647, 47 Pac. 533.) The defendant asserts that the plaintiff is precluded from recovery by the fact that he never presented his claim as required by the rules quoted. To this he responds that on November 6, 1915, his attorneys wrote a letter, demanding payment of his claim, to the defendant's general secretary and treasurer, who sent an answer saying:

"I find that Mr. Conroy was formerly a member of our organization belonging to lodge No. 41 at Clinton, Ill., however, he was expelled by that lodge on October 1st, 1914, consequently as he is no longer a member of the Brotherhood, the Organization would not be liable for any injury sustained by him."

The plaintiff contends that this answer excuses his omission to comply with the rules, and amounts to a waiver of all defenses excepting that specifically referred to. The defendant responds that the officer who wrote the letter had no authority to waive its rights—that such is the law of Ohio, and that the contract by its terms is to be interpreted according to the laws of that state. Out of the rather extensive field of issues thus presented, we select for consideration the one most closely related to the substantial rights of the parties—the question whether the plaintiff was a member of the order at the time of his injury.

2. Dues were required to be paid monthly in advance, before the first day of each month. The failure to make payment within the time stated automatically effected an expulsion. The plaintiff joined the order in April, 1914. His dues for the following December were not paid. A meeting of the local lodge to which he belonged was held on the evening of December 2, and at that time an entry was made in the record of the proceedings reading: "Treasurer's report of expelled members. The following members were reported expelled: R. J. Conroy." Obviously, the purpose of this was not to show the plaintiff's expulsion by action of the lodge, but to make a formal record of the fact that his membership had been terminated by his failure to pay his dues. On December 4, he received a notice, dated December 2, stating that he had been expelled. On December 14, his sister, who had been attending to his payments, sent the amount of his December dues to the lodge treasurer, but it was refused. No application for his reinstatement was made. As already mentioned, the injury occurred January 24, 1915. On July 13, 1915, the plaintiff, according to his testimony, mailed a letter to the general secretary and treasurer stating that his attorney had told him he had not been expelled, and that he was entitled to his money for his disability, and asking for blanks to use in making out his claim. The defendant's evidence is that no such letter was received. The only other correspondence on the subject was that already referred to—the letter of November 6, and its answer.

The plaintiff's failure to pay his dues for December, within the time prescribed, worked a forfeiture of his membership,

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according to the terms of his contract. To avoid this effect he relies upon the establishment of a practice on the part of the defendant of accepting payments after the expiration of the period fixed by the constitution. The scope of the general rule in that regard, and its limitations, are indicated in the following statement of it, a clause having especial bearing upon the present situation being here italicised:

"Where a mutual benefit association has, in repeated instances, received from a member the payment of overdue assessments, so as to establish a custom or course of dealing between the parties and lead the member to believe that a strict observance of a requirement as to the time of payment is not required, it is held that the certificate of insurance is not forfeited by failure to pay an assessment at the time when the by-laws of the society or a stipulation in the certificate requires it to be paid *provided it is paid within the customary period of extension of the time of payment*, for the association is estopped by its course of conduct from claiming a forfeiture according to the strict letter of its contract." . . . "But to invoke the doctrine of estoppel under such circumstances, the course of conduct must amount to an actual custom and not consist of occasional acts of indulgence on the part of the association. And it must be shown that the delinquent member had notice of the practice and relied thereon." (19 R. C. L. 1274, 1275.)

There was evidence that the collector of the local lodge was in the habit of receiving dues after the time fixed, but only within a definite period. He testified: "Our pay day falls on the first, but the dues are supposed to be paid before, but I always accept money between the first and the fifth, because I have five days of grace to send this money away." There is no evidence of any practice of receiving dues after the 5th. Another witness gave this testimony: "I worked with the financier three or four years I expect and have taken as many as a dozen or fifteen dues between the first and the fifth." The plaintiff's sister, who had made all the payments in his behalf, testified: "I always paid the dues for my brother about the first of each month. I never paid them after the second or third of the month." A practice of the collecting officer to accept past-due payments which are offered before the making up and transmission of his report cannot be regarded as affecting an indefinite extension of the time of payment. Here no tender of the plaintiff's December dues was made before the 15th. No practice of receiving dues at that date was shown to exist, whether known to the plaintiff or



not, and we hold that the belated offer was not sufficient to continue his membership in force.

3. If action by the lodge had been necessary to bring about the expulsion of the plaintiff, and had been taken on the second, it might be regarded as ineffective because contrary to the custom which had been established. But no such action was necessary or was in fact taken. If the local officers had been offered the money necessary to keep the plaintiff in good standing, before they had made a report—while the record was still within their control—they might have accepted it "*nunc pro tunc*" and amended the entries accordingly. The mere making of an entry showing such a noncompliance with the rules as in itself by the written law worked a forfeiture, although it may have been tentative and subject to recall if compliance should be made within the period of grace allowed by usage, is not tantamount to affirmative action attempting an expulsion in violation of an established custom. No connection whatever is shown between the notification to the plaintiff that he had been expelled and the delay on the part of his sister in sending the money for his December dues.

4. Assuming that the duties of the general secretary and treasurer were of a character to make the defendant fully responsible for his letter above quoted, and that its statements are such as to cut off all defenses except that based upon the plaintiff's loss of membership, we think it would be extending the principle of waiver too far to hold that because the letter stated that the plaintiff had been expelled on October 1 the association could not rely upon an expulsion which took place December 1. The situation is quite different from that presented in *Mayer v. Knights & Ladies of Security*, 92 Kan. 841, 142 Pac. 290. There dues were required to be paid before the last of each month. No payments were made in June or July, 1909, but the dues for June, July, and August were all offered at once, and accepted. In the litigation which followed, the association asserted that this payment was not made until September 4, but the claimant contended, and the court found, that it was made on August 31. The death of the member occurred September 8. In response to a claim against the association, its president wrote a letter denying liability on grounds which were thus stated:

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"The assessment and dues of Mrs. Mayes, which were due on the first day of August, and which she had until midnight of the last day of August to pay, were not paid to the financier of Free Silver Council No. 198 until September 4. Consequently, the deceased was suspended for nonpayment of the August assessment and dues from midnight of August 31 until September 4, 1909. . . . We are in possession of evidence that can not be questioned showing that the deceased was seriously ill on September 4, 1909. . . . Consequently, no reinstatement could possibly have been had on the date that payment was made by the sister of the deceased, which was September 4, 1909, owing to the physical condition of the deceased when the attempt was made to reinstate her." (pp. 843, 844.)

It was held that the defense was limited to the controversy over the August dues, the court saying:

"With the knowledge of the facts, as we must presume, and as implied in his letter, the president of the association placed its refusal to pay the certificate distinctly upon the alleged failure to make the August payment, without making any objection or claim because the other payments were made without producing a health certificate, thereby apparently adopting the act of the financier in receiving the June and July payments.

"When the demand for the allowance of the claim was made upon the association it could insist upon, or waive, any forfeiture or forfeitures claimed. It elected to rely only upon the forfeiture claimed by reason of the delay in the August payment, thereby waiving any others it might have claimed." (pp. 845, 846.)

In the present case the writer of the letter testified that the word October was used in place of December through a mere clerical error, the records showing the latter date. The plaintiff knew that his expulsion was for the nonpayment of dues; that he had paid his October dues, and had not paid those for December; the records of his lodge showed the grounds of his expulsion, and doubtless the notice sent him did also, although it was not produced in evidence. The defendant's secretary did not elect to rely upon the effect of one of several delayed payments. There was no controversy or question with respect to any dues other than those for December. The mere unintentional error in indicating the month of the plaintiff's default is not a just basis for imposing upon the defendant a liability to one who had ceased to be a member of the order.

The judgment is affirmed.

No. 21,377.

CLYDE E. KNIGHT, *Appellee*, v. FRED J. COSSITT, *Appellant*, et al.

## SYLLABUS BY THE COURT.

**AUTOMOBILE—Operated by One Partner—Injury to Third Party—Liability of Other Partner.** On the trial of an action for damages caused by a collision between automobiles, the evidence introduced proved that a father and his 23-year-old son, with the wife of the father, lived together as one family, and that the father and son jointly owned an automobile which was used for family purposes, and, when so used, was ordinarily driven by the son. The evidence also proved that the son used the automobile in his private business; that in the absence of the father, and without his knowledge, the son took the automobile to make a trip of his own; that the mother got into the automobile to ride with him; and that an accident then occurred, which resulted in an injury to the party bringing the action. *Held*, that the evidence was not sufficient to establish the relation of master and servant between the father and the son.

Appeal from Sedgwick district court, division No. 2. THORNTON W. SARGENT, judge. Opinion filed April 6, 1918. Reversed.

*David Smyth*, and *J. W. Smyth*, both of Wichita, for the appellant.

*P. D. Gardiner*, *H. C. Castor*, *Kos Harris*, and *V. Harris*, all of Wichita, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendant appeals from a judgment against him in favor of the plaintiff, for damages sustained by the plaintiff in an automobile collision. The vital question presented is the sufficiency of the evidence to sustain the verdict in favor of the plaintiff. Fred J. Cossitt, with his wife, Carrie C. Cossitt, and his son, Bruce Cossitt, who was 23 years old, lived together as a family. Fred J. Cossitt and Bruce Cossitt together owned an automobile. The automobile was used for family purposes, and was also used by Bruce Cossitt in his business of delivering newspapers in the city of Wichita. When used for family purposes, the automobile was ordinarily

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driven by Bruce Cossitt, but it was sometimes driven by Fred J. Cossitt.

On October 14, 1915, Bruce Cossitt started with the car to go to the post office to get some mail which he was expecting. His mother went out and got into the car to ride down town. On the way down town the accident occurred for which this action was brought. Fred J. Cossitt was out of the city at the time of the accident and did not learn anything about it until after his return. He knew nothing about the use of the car on that occasion.

If Fred J. Cossitt is liable to the plaintiff, it is because Bruce Cossitt was, at the time of the accident, the servant of Fred J. Cossitt. In *Halverson v. Blosser*, 101 Kan. 683, 168 Pac. 863, this court said:

"An owner of an automobile is not liable for injuries caused in its operation by others, unless such others were servants or agents of the owner and acting in furtherance of his business." (Syl. ¶ 1.)

(See, also, Notes found in 41 L. R. A., n. s., 775; 50 L. R. A., n. s., 59; L. R. A. 1916F, 223.)

Joint ownership of the automobile did not make Bruce Cossitt the servant or agent of his father.

"Where one of two partners or joint owners of an automobile was using it on a pleasure trip of his own, and not on behalf of or within the reasonable scope of any partnership business, the other owner is not liable for damages sustained in a collision through the negligent driving of his coowner." (*Hamilton v. Viose*, 90 Wash. 618, syl. ¶ 1.)

A note on the liability arising out of the joint ownership of automobiles is found in L. R. A. 1916E, page 1301. Bruce Cossitt had the right to use the automobile without his father's consent. When Bruce Cossitt was using the automobile in his own business, he was not the servant of his father. The evidence and the eighth finding of the jury show that Bruce Cossitt was using the automobile for his own purposes when the accident occurred. He started to town on his own business; not for the pleasure or convenience of his mother; she went with him. The only evidence to show that the relation of master and servant existed was that which proved that the mother got into the car to ride down town with Bruce Cossitt. That evidence was not sufficient to establish that fact. Bruce Cossitt's part ownership of the car gave him the right to use

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it as he saw fit; he could take his mother in the car with him, and not thereby become the servant of his father. It was, therefore, necessary for the plaintiff to do more than prove the family relation existing between Bruce Cossitt and his father and mother, and to do more than prove that the mother was riding with Bruce Cossitt at the time of the accident.

There was no evidence to establish the relation of master and servant, and, therefore, there was not sufficient evidence to sustain the verdict.

The judgment is reversed, and judgment is rendered in favor of the defendant.

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No. 21,385.

THOMAS BREEN et al., *Appellees*, v. MARGARET BREEN,  
*Appellant*.

• SYLLABUS BY THE COURT.

**HOMESTEAD—Occupied by Widow Alone—Not Subject to Partition.** A homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by the widow, who elects to take under the law rather than under the will, cannot be partitioned without her consent at the suit of collateral heirs who were never members of the testator's family.

Appeal from Clay district court; FRED R. SMITH, judge. Opinion filed April 6, 1918. Reversed.

W. S. Roark, of Junction City, C. Vincent Jones, of Clay Center, Lee Monroe, James A. McClure, and C. M. Monroe, all of Topeka, for the appellant.

F. L. Williams, Willaim M. Beall, both of Clay Center, and James L. Hugin, of Kansas City, for the appellees.

The opinion of the court was delivered by

JOHNSTON, C. J.: This is an appeal from the judgment of the trial court sustaining a demurrer to the defendant's answer and cross petition. The litigation arose over the estate of Thomas Breen, deceased, and two appeals have already been taken to this court upon certain phases of the contest. (*Breen v. Davies*, 94 Kan. 474, 146 Pac. 1147; *Breen v. Davies*, 99

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Kan. 110, 160 Pac. 997.) The present action was brought by the devisees of the deceased against his widow, Margaret Breen, to recover their share of the estate of the decedent and to have it partitioned among the heirs. One-half of all the real estate of the deceased was devised to plaintiffs, who are the two brothers, a sister, a nephew, a niece, and a cousin of the deceased, and all of them residents and citizens of Ireland, and the other half was given to his wife, the defendant. Part of the land in controversy was a tract of about seventy acres which was the homestead of the deceased and his wife, who had no children, and it is still occupied by his widow. The defendant concedes the plaintiffs' interest in and right to a partition of all of the land involved except the homestead, and contends that as she had continuously occupied it since her husband's death and has no intention to abandon it or live elsewhere it remains a homestead and is not subject to partition. Defendant also alleged that she had duly elected in the probate court to take under the law and not under the will, and that she had never consented to any attempt on the part of the deceased to divest himself or her of the homestead right in this particular property. When the trial court sustained the demurrer to defendant's cross petition and held the homestead to be subject to partition defendant elected to stand upon her cross petition, and the court gave judgment awarding the plaintiffs their respective shares and directing a partition of all the lands of the estate.

The only question involved in this appeal is: May a homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by his widow, who elects to take under the law rather than under the will, be partitioned at the suit of collateral heirs who were never members of the testator's family? We must look to the constitution and the statutes for an answer to the question. Under the constitution the homestead is a grant to the family, and within the meaning of the grant the surviving spouse, although without children, is to be regarded as the family of the deceased owner and entitled to hold the homestead exempt from forced sale under any process of law. The grant has been enlarged to some extent by the statute of descents and distributions, which provides that the homestead which con-

tinues to be occupied by the family after the death of the owner shall be wholly exempt from distribution under any of the laws of the state, as well as from the debts of the intestate, and shall also be the absolute property of the widow and children. (Gen. Stat. 1915, § 3825.) It has already been determined that the homestead privilege is not terminated by the death of the owner, but persists in favor of the family, even though it may consist of but a single person, and that the surviving wife, although the sole occupant, is entitled to the shelter of the home and benefit of the exemption as fully as it was enjoyed by her husband and herself before his death. (*Cross v. Benson*, 68 Kan. 495, 75 Pac. 558; *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273; *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074.)

The statute of wills provides that "any married person having no children may devise one-half of his or her property to other persons than the husband or wife." (Gen. Stat. 1915, § 11791.) But the widow of the testator, having elected to take under the law and not under the will, is entitled to all the privileges accorded by the statute of descents and distributions, the same as if her husband had died intestate. (Gen. Stat. 1915, § 11798.) By that statute, the family of the deceased owner—the widow and children, and if no children then the widow—occupying the homestead is entitled to hold it absolutely free from distribution under any of the laws of the state. Plaintiffs contend that the constitutional exemption applies only while the owner is living; that the devolution of title is a matter of statutory regulation; and that upon the death of the owner, leaving a will, the rights of the family are to be determined by the statute of wills. It is true that the transfer of title and the distribution of the estate of a deceased person are controlled by the statute, and not by the constitutional guaranty of exemption, but it has been expressly held that the constitutional exemption does not end with the death of the owner, but continues as long as the family occupies it as a residence. To sustain plaintiffs' contention as to the duration of the homestead right, it has been said that it would be "to engraft upon the words of the constitution, 'shall be exempted from forced sale under any process of law,' the alien phrase 'during the

lifetime of the owner whose family occupies it.' The constitution itself forbears to express any such limitation. Such an interpretation can scarcely be made in a document which enumerates its own exceptions and prescribes its own limitations, and much less should it be undertaken when the result would be to abridge the scope and curtail the benignant power of a remedial charter." (*Cross v. Benson*, supra, p. 503.) The constitutional guaranty does not undertake to control the transmission of title to property, neither is it restricted by the statutes regulating the transfer of title, for to whomsoever the title of the property may go, and whether it goes by descent or by will, the homestead right continues as long as the family occupies the home as a residence. The contention that the owner having disposed of his property by will the homestead right ends as to the property devised to the plaintiff, and that the rule limiting the distribution of homesteads prescribed in the statute of descents and distribution does not apply, cannot be upheld, since the statute of wills itself provides that if the widow elects to take under the law her rights will be the same as if her husband had died intestate. The widow having availed herself of this privilege and taken under the law, we must look to the statute of descents and distributions to ascertain her rights as against the claims of the plaintiffs. That statute, as we have seen, reaffirms and extends the exemption given by the constitution. But for that statute the homestead guaranty would have remained indefinitely in the family of the owner occupying the house, wholly exempt from debts and from distribution. If authority exists for terminating the homestead right and for distribution of the homestead property, it must be found in the statute. It is provided, as we have seen, that the homestead shall be exempt from the payment of debts and from distribution during its occupancy by the widow and children. The design of the law is that the homestead entire is to be enjoyed by the widow and children constituting the family, and if the owner left no children, the widow is to continue in its enjoyment, and if children were left and no widow, the children are entitled to it. (Gen. Stat. 1915, § 3827.) The conditions upon which a division or distribution of the homestead may be made have been expressly enumer-



ated by the legislature, and those are: if the widow marries again, or the children of the family arrive at the age of majority; and, of course, it may be ended by abandonment. (Gen. Stat. 1915, § 3828.) If the widow is the only constituent of the family, as in this case, there can be no distribution without consent, unless the widow ends the family relation by another marriage. The court went to the limit in *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228, in holding that the homestead of the widow might be partitioned when all of the children reached majority. This holding was based upon the theory that the homestead privilege given by the constitution was one extended to the family of the intestate, and was intended as much for the benefit of the children who constituted a part of the family as it was for the widow, and that, therefore, the homestead might be divided among them when the youngest child arrived at the age of majority. The logic of the case is that the legislature, looking to the welfare of the children as well as the widow, provided for a division of the property among the members of the family. Those who are outside of the family do not come within the terms of the statute authorizing distribution and have no right to claim the privileges and benefits conferred upon members of the family. The plaintiffs, who are collateral heirs, have never lived in the home of the owner, and, indeed, they have never been citizens or residents of this country. The homestead right should not be disturbed, nor should there be any interference with its enjoyment through a division or distribution, unless it is expressly provided by statute. Authority has been granted to divide the homestead among members of the family, but nothing in the law suggests that strangers to the family circle can break up the home and obtain a division of the property so long as its homestead character is preserved and it is occupied by the family of the deceased as a home. In this case the widow constitutes the entire family of the owner, she has never married, nor has she done anything to divest her of the homestead privilege. As was said in *Voelz and wife v. Voelz and others*, 88 Wis. 461,

"Our laws have thrown around the homestead every necessary protection for the humane and beneficent use for which it was designed, and no such exception by which the widow could be divested of it is found in the statute. It would require positive legislation to subject

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the widow's homestead to the uncertain tenure of the capricious action of the heirs, whenever they might wish to have a partition or sale of the lands of the estate. There is not only no such provision, but, as we have seen, the statutes and the nature of the homestead right preclude any such interference with it." (p. 464.)

(See, also, *Keyes v. Hill*, 30 Vt. 759.)

It must be held that a homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by his widow, who elects to take under the law rather than under the will, cannot be partitioned without consent, at the suit of collateral heirs who were never members of the testator's family.

The judgment is reversed and the cause remanded with directions to enter judgment in favor of the defendant.

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No. 21,407.

BERT RUCKER, *Appellant*, v. C. W. ALLENDORPH and MARTHA S. ALLENDORPH, *Appellees*, et al.

SYLLABUS BY THE COURT.

**TORT-FEASORS**—*Contribution Between Joint Tort-feasors.* A person who voluntarily commits an actionable wrong, either at the instigation of others or by acting jointly with them, for which wrong a judgment is afterward rendered against him, cannot recover from those who induced him to commit the wrong, or with whom he acted in its commission, any loss or damage sustained by him by reason of the rendition of the judgment.

Appeal from Shawnee district court, division No. 1; ALSTON W. DANA, judge. Opinion filed April 6, 1918. Affirmed.

*Joseph M. Stark, Joseph G. Waters, and John C. Waters*, all of Topeka, for the appellant.

*Lee Monroe, James A. McClure, and C. M. Monroe*, all of Topeka, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff appeals from a judgment rendered against him on the pleadings. These consisted of the plaintiff's petition, the defendants' answer, and the plaintiff's

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reply. The material facts established by the pleadings are substantially as follows:

For some years the defendants had been engaged in fraudulent real-estate transactions. These transactions consisted of the execution and delivery of purported warranty deeds pretending to convey the title to the real property therein described, and of delivering with such deeds spurious and forged abstracts of the title. These deeds and abstracts impliedly represented that the defendants had good title to the property, and were delivered for the purpose of defrauding those to whom the defendants effected a sale of the property. For some years the plaintiff had been a real-estate agent in Topeka. In 1911, he received from defendant H. A. Miller, a real-estate agent of Kansas City, Mo., a purported warranty deed pretending to convey certain real property in Missouri from the defendants C. W. Allendorph and Martha S. Allendorph. That deed was blank as to grantee, and did not convey any title to the land therein described. Marion A. Tatlow owned an equitable interest in real property in Morris county. W. E. Bacon was a subagent of the plaintiff. The deed received from the Allendorphs was, by the plaintiff, delivered to Bacon with instructions to Bacon to go to Tatlow, who lived at White City, and effect an exchange of the land described in the deed for an assignment of Tatlow's interest in the Morris county land. The exchange was made, and the deed was delivered to Tatlow by Bacon. When the deed was delivered to Tatlow, a purported abstract of the title to the Missouri land was also delivered to him. The abstract did not correctly represent that title. Neither the deed nor the abstract was examined by Rucker. Afterward, Tatlow prosecuted an action in the district court of Shawnee county against the plaintiff and Bacon, to recover the damages that he had sustained by reason of the fraud practiced on him in making the exchange of property, and recovered a judgment in that action against Rucker for \$3,117. In that action the jury made special findings of fact, in substance, as follows: That Bacon fraudulently represented to Tatlow that the deed to the Missouri land was a valid instrument; that it conveyed a good title to the Missouri land; that the abstract of title was genuine; that these representations were made at the instigation of Rucker;

that both he and Bacon knew that the representations were false; and that Tatlow relied on the representations and made the exchange.

In his petition in the present action, the plaintiff charges that the defendants practiced a fraud on him, and thereby induced him to make the exchange of lands with Tatlow. The petition does not allege that any false representations were made by the defendants, except those that were impliedly made in the papers delivered to the plaintiff. He seeks to recover the damages sustained by him on account of the fraud practiced on him by the defendants. The damages alleged are all consequent, or hinge, on the judgment in favor of Tatlow.

The papers did not make any representations to the plaintiff for the reason that he did not examine them, and, therefore, did not know what they contained. If he had examined the papers, he would have seen that the deed was blank as to grantee, and, possibly, would have learned that the abstract was defective. Notwithstanding the fact that he did not know what the papers contained, he, through his subagent, made the representations found by the jury. These representations were made when, according to the allegations of his petition, Rucker did not know whether they were true or false, although he alleges that he acted in good faith.

In *Bank v. Hart*, 82 Kan. 398, 108 Pac. 818, this court said:

"False representations are actionable when made fraudulently—that is, to induce another to part with his money or property—if believed and acted upon and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury." (Syl. ¶ 1.)

(See, also, *Breeding Association v. Scott*, 53 Kan. 534, 36 Pac. 978; *Refrigerator Co. v. Pert*, 3 Kan. App. 364, 42 Pac. 943; 20 Cyc. 24, 27.)

This principle of law controls the circumstances now being considered by the court.

Another principle that will assist in reaching a correct conclusion is that where one of several wrongdoers has been compelled to pay damages for a wrong committed, the general rule is that he cannot compel contribution from the others who

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participated in the commission of the wrong. (9 Cyc. 804; 6 R. C. L. 1054-1056.)

If Rucker did not make the false representations found by the jury, that fact would have been a defense in the action of Tatlow v. Rucker. If he, in fact, did not make the false representations, judgment was wrongfully rendered against him; but the fact that judgment was wrongfully rendered against him does not, of itself, give him a cause of action against the defendants. If Rucker made the representations, he made them voluntarily, and he cannot recover from the defendants for his voluntary wrong. In either event, on the facts established by the pleadings, he cannot prevail against the defendants in this action.

The judgment is affirmed.

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No. 21,416.

L. W. GEORGE, *Appellee*, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. NEGLIGENCE—*No Buffer Appliances on Cars—No Liability Established.* A railroad company is not required to equip its cars with buffers or bumpers for the protection of brakemen in coupling or uncoupling cars. Hence, the findings that the negligence in this case consisted in the failure to equip with buffer and buffer appliances do not establish liability.
2. SAME—*Equipment of Cars Required for Protection of Brakemen in Coupling and Uncoupling Cars.* A train is required to have eighty-five per cent of its cars equipped with air brakes, so that it can be operated by the engineer, thus rendering it necessary to have certain of the cars connected by air hose. While in the complete process of uncoupling, the coupler itself and also the air hose and safety chains may have to be disconnected, there is no requirement that the cars be so equipped that such air hose or safety chains can be disconnected without going between the cars.
3. SAME—*Allegations—Proof.* Two of the three alleged grounds of negligence being based on matters not required of the defendant, and the other having failed of proof, the plaintiff cannot prevail.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Reversed.

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*William R. Smith, Owen J. Wood, and Alfred A. Scott, all of Topeka, for the appellant.*

*W. L. Cunningham, of Arkansas City, for the appellee.*

The opinion of the court was delivered by

WEST, J.: The plaintiff recovered a judgment for injuries received in uncoupling a car at Maramec, Okla. It was alleged that the coach was defective in this:

"That it had no buffer to prevent the same from running up against the next car in front of it, . . . that it was defective in that the brake on said car did not operate properly, . . . that it was further defective in that it was not so constructed that it could be uncoupled from the car connected with it without the brakeman going between the cars and uncoupling the air hose and also the safety chain."

It was averred that in obedience to the direction of the defendant the plaintiff went between the coach in question and the next one in front and attempted to uncouple the air hose and disconnect the safety chain, but just as he uncoupled the air hose the air locked and the brake on the car released so that the car moved forward and caught his head between projecting bolts on each of the cars, striking him behind the ears and severely injuring him. The answer contained a general denial, and alleged contributory negligence and assumption of risk. The jury found the negligence of the defendant to consist in not properly equipping the coaches with buffers to hold them apart, and that the plaintiff was not guilty of contributory negligence. Also:

"9. Was the equipment of the mixed train . . . usual and ordinary equipment of such trains used and employed by the railroad companies for such service? Ans. According to evidence it was not properly equipped; as [to] being equipped for that particular kind of service we do not know."

The defendant appeals, and insists that what the jury called negligence is not negligence at all. The plaintiff testified that there was no buffer on these cars, that bumpers were supposed to bump together to keep the cars from coming close together, but did not know that he had ever used one himself. It is said that the list of safety appliances which railway companies are required to keep by virtue of the safety-appliance act and the orders of the interstate commerce commission does not include

buffers or bumpers. Further, that buffers might come together as well as the ends of the coaches, and therefore an employee might be crushed between the former as well as between the latter. The court instructed that the law requires all railroads to equip its trains and cars with all reasonable and approved safety appliances and to make such frequent examinations, inspections, and adjustments as would keep the trains and cars and appliances in a reasonably safe condition, and that while an employee assumes the ordinary risks he does not assume that of injury to himself when it occurs by reason of the failure of the companies to furnish reasonable safety appliances and equipment. It is said that this instruction ignored the doctrine that if the plaintiff went between the cars to uncouple them with full knowledge of the fact that they were not equipped with buffers he assumed the risk. The plaintiff testified:

"If the car had n't have come forward I would have been perfectly safe in the position I was in. I knew that if it did come forward I would n't be safe. There have been lots of them caught that way and killed that way. I knew that at the time. I did not have it in mind right at the time I was working there. I knew that was a dangerous feat and that it had to be performed every time I uncoupled cars. I was perfectly well aware of the danger of going in there."

When the plaintiff testified that he knew it was a dangerous feat and was perfectly well aware of the danger of going between the cars, he evidently meant that the danger consisted in the possibility or likelihood of the cars coming together. He knew and could see that there were no bumpers or buffers, and, as he said, if the car had not come forward he would have been perfectly safe. It was the danger of coming forward without warning that attended his efforts, and it was the actual coming forward that caused his injury. It is possible that if bumpers had been placed in the center of the platform in each of the cars he might have escaped injury by keeping his head to one side of the center of the car ends, but it seems about equally possible that he might have been crushed between the bumpers instead of the platforms by raising his head so as to be caught between the bumpers.

His allegation that the air coupling was defective was not sustained by the findings of the jury, who confined the matter

of negligence to the failure to equip the cars with buffers, except as indicated by finding 9 already referred to.

The definitions of buffer indicate a contrivance to mitigate the shock caused by cars coming together, rather than a safety appliance, Webster defining it as an elastic apparatus or fender for deadening the jar caused by the collision of bodies. Cases are cited in which cars were provided with buffers which, failing to meet vertically or horizontally, caused injury, and the companies were held liable. But we have neither had cited, nor have we found, a federal decision or rule requiring buffers or bumpers, although one or two state cases are pointed out which seem to regard them as protectives for the workmen. The following portion of the plaintiff's cross-examination is the entire evidence touching bumpers:

"There was no buffer or muffler on these cars that I remember of. I don't know as I ever used one of them myself. The bumpers are supposed to bump together to keep the cars from coming close together. There was nothing of that kind on these two cars."

It is claimed that disconnecting the air hose is a part of the process of uncoupling, and *United States v. Boston & M. R. Co.*, 168 Fed. 148, is cited. There the district judge in charging the jury stated that—

"A man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars." (p. 152.)

But we are unable to find any other rule or holding to this effect. The safety-appliance act and the orders of the interstate commerce commission require a railroad company to have eighty-five per cent of the cars composing a train equipped with air, so that the train can be operated by the engineer. No means appears to have been devised or required for uncoupling the air hose or safety chains without going between the cars, as in case of the coupler itself. Hence, while in uncoupling two cars, connected as these were by a coupler, safety chains, and air hose, it is true in a generic sense that disconnecting the air hose is a part of the process, we are unable to agree that it is a part of the process of uncoupling within the meaning of the safety-appliance act, which has made no requirement concerning the disconnecting of such air hose while remaining clear



from the ends of the cars. The operation necessary in the case of cars connected with chains and air hose was thus described by the plaintiff:

"After the train stopped the first thing I did was to go in to cut the coach off. I turned the angle cock. They are right back on each car. One in front of the car and one behind on the side of the drawbar. It cuts the air off of each car. That does not release the brake. It has nothing to do with the brake. The brake is still set after that is turned. You have to open the brake hose and open the angle cock to release the brake, let out the air. Have to bleed the car to let the air out of it. I did not do that that day. I did n't do anything to release the brakes. There is no way to shut off the angle cock without going between the cars to do it. In order to uncouple the cars you have to turn each of the angle cocks. Then we have to unhook the safety chains. We just take out the big hook that hooks into the link of a chain. There is one of these on each side. To unhook the one on the other side we reach over the drawbar. Otherwise you would have to go around the car. It is the customary way to reach over the drawbar. I never did see anybody go around in the two years I worked there. After I unhooked the safety chains the next step in the process of uncoupling was to break the air-hose. To do that you catch them in the center and lift up on them. We let them hang down. The next process is to lift the pin. We do that by a lever on the outside of the car. We step back and lift that out with the lever. . . . I was standing when I unhooked the safety chains. My head was straight up. That brought the bumper about to my waist. I first unhooked the chain next to me. I was on the east side of the train. Then I unhooked the other chain by reaching over the drawbar. It is easily reached from there. That is the way I always did it. I next turned the angle cocks. You have to turn them off before you break the air hose. If you don't the hose will fly up and hit you in the face. When you turn the angle cocks you are ready to uncouple the hose. That is all that remains to be done."

Counsel says that in *Schlemmer v. Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, it was held to be a question for the jury whether the company was negligent in failing to provide its cars with buffers. An examination of that decision shows that plaintiff alleged that the coupling was not such as was required by existing laws. The court having directed a nonsuit, the plaintiff moved "to take it off," one ground being that the decedent "was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler." (p. 9.) It was said in the opinion that, instead of an automatic coupler, the car had an iron drawbar fastened underneath by a pin projecting about a foot beyond the car.

This drawbar weighed about eighty pounds, and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end possibly a foot so that it could enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye.

"Owing to the absence of buffers on the shovel car and to its being so high that it would pass over those on the caboose, the car and caboose would crush anyone between them if they came together and the coupling failed to be made." (p. 8.)

We do not find in the statement or in the opinion anything to indicate that an instruction leaving it to the jury to say whether or not the absence of buffers constituted negligence, was given. In this opinion it was held that assumption of risk as extended to dangerous conditions of machinery obviously shades into negligence as commonly understood, the difference between the two being one of degree rather than of kind. From this opinion Justices Brewer, Peckham, McKenna and Day dissented. In 220 U. S. 590, when the case was again before the court, it was unanimously decided that there is a practical and clear distinction between assumption of risk and contributory negligence. Hence, we could not regard the cited *Schlemmer* decision as controlling, even if in point.

It is said in the defendant's brief that there was no pretense that the defendant had violated any of the safety-appliance acts of congress. Neither do we find any such claim in the plaintiff's brief, aside from the one that the defendant was required to equip its cars with bumpers.

This, then, is the situation: The negligence charged consisted of failure to equip with bumpers, of failure of the air brake to act properly, and failure to equip so that the car "could be uncoupled from the car connected with it without the brakeman going between the cars and uncoupling the air hose and also the safety chain." The law requires neither the first nor the third, and the jury disregarded the second. Hence, the plaintiff cannot prevail.

The judgment is reversed and the cause remanded with direction to enter judgment for the defendant.

No. 21,419.

A. F. LOMBARD, *Appellee*, v. O. W. UHRICH and B. H. UHRICH, Partners as the UHRICH PLANING MILL COMPANY, *Appellants*.

## SYLLABUS BY THE COURT.

1. **COMPENSATION ACT—Judgment for Weekly Payments—Petition for New Trial—No Grounds for New Trial Alleged.** Judgment was rendered under the workmen's compensation act, providing for the payment of four dollars a week during the period of plaintiff's partial incapacity, and providing that the defendants should be relieved from the payments if they continued the plaintiff in their employ and paid him the same wages as he received before he was injured, and providing that whenever the plaintiff should quit the defendants' employ, the payments should begin. A petition for a new trial was filed, alleging that the plaintiff acted fraudulently in procuring the judgment, in that he intended to quit the defendants' employ and seek employment elsewhere at increased wages, and alleging that the plaintiff did quit the defendants' employ and did procure employment elsewhere at increased wages. *Held*, that the petition did not state facts sufficient to compel the trial court to grant a new trial.
2. **SAME—New Order as to Payments Proper.** Under the circumstances disclosed in paragraph 1 of this syllabus, the court ordered that if the defendants defaulted in the payment of four dollars a week the entire amount of compensation should become due, and that execution should then issue therefor. *Held*, that it was not error to enter that order.

Appeal from Montgomery district court; JOSEPH W. HOLDREN, judge. Opinion filed April 6, 1918. Affirmed.

O. L. O'Brien, and W. N. Banks, both of Independence, for the appellant.

Thomas E. Wagstaff, of Independence, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendants appeal from an order striking a petition for a new trial from the files. The action was brought to recover compensation under the workmen's compensation law. There was a trial by the court, without a jury; special findings of fact were made, and judgment was rendered in favor of the plaintiff for ten weeks' total incapacity, and for partial incapacity during the remainder of

eight years at four dollars a week, to be paid every two weeks, and—

“That the defendants shall be relieved from the periodical payments herein specified if they shall receive the plaintiff back into their employ and continue him therein and pay him the same wages as he was receiving at the time of his injury, but whenever plaintiff quits the defendants’ employ the payments herein fixed for shall begin.”

Each of the parties filed a motion for a new trial; both motions were afterward withdrawn, and each of the parties consented—

“That the court shall fix the amount which the said defendants shall pay into court to satisfy the judgment heretofore rendered as to payments which the said plaintiff shall receive during the period of his total incapacity and during the further period that the said plaintiff was not in the employ of the said defendants, and the said plaintiff and the said defendants further joining in a request upon the court to fix the amount of attorney’s fees for the attorney for the plaintiff herein.”

Almost six months afterward the defendants filed a petition for a new trial, and in that petition alleged—

“That thereafter and before the hearing of said motion for a new trial it was agreed between the plaintiff and these defendants that the plaintiff would remain in the employ of these defendants and that these defendants would give him employment at the same wage that he had received from them before his said injury complained of in his petition filed herein and that as long as these defendants furnished to plaintiff such employment he would remain in the employ of these defendants and that these defendants should not under those circumstances pay nor be called upon to pay by the plaintiff the said sum of four dollars per week.

“It was further mutually agreed between the plaintiff and these defendants that in consideration of the mutual agreement of the defendants to furnish employment to plaintiff and plaintiff to accept said employment as above set forth that each of the parties to this action would withdraw their motion for a new trial and that the defendants would pay to plaintiff the sum of one hundred and eighty-seven and ninety one-hundredths (\$187.90) dollars and the costs of this action taxed at fifteen and twenty-five one-hundredths (\$15.25) dollars.

“These defendants further state that since the said 31st day of October, A. D. 1916, they have procured newly discovered evidence by which they can prove that the said plaintiff in entering into the agreements as set forth herein with them entered into said agreements with the intention of violating the same and with the intention of not remaining in the employ of these defendants and with the intention as

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soon as the judgment and agreement entered into in this case became final that he would quit the employ of these defendants and enter into other employment where he could earn as much money as he was being paid by these defendants and after a period of time attempt to collect from these defendants the said sum of four dollars per week.

"That in so doing the said plaintiff wilfully and intentionally deceived and defrauded this court and these defendants.

"Defendants further state that the said plaintiff in quitting the employ of these defendants, quit said employ without any reason therefor, that they were then, and will now, and have at all times been willing, able and ready to give the plaintiff employment as contemplated by this court in making the said findings and in rendering its said judgment herein, and that they are now ready, able and willing to furnish plaintiff employment at the same wage which he was receiving and which was contemplated he should receive by this court in making its said findings and in entering into the agreement and in rendering the judgment that was rendered in this cause, but that the said plaintiff prefers to leave the employment of these defendants for the sole reason that he can and is able to earn as much or more money by working for other people in a like capacity."

The petition for a new trial was stricken from the files on the motion of the plaintiff. He made an application for an order to enforce the judgment. On that application the court made the following order:

"It is by the court further ordered that the defendants pay to the plaintiff within ten (10) days from this date the sum of four (\$4.00) dollars per week from October 31st, A.D. 1916, to this date, and continue to pay to the plaintiff the sum of four (\$4.00) dollars per week for the time and period fixed in the original judgment of this court. And that in default of any of such payments that the whole amount of such payments in lump sum of the entire amount of compensation, payable as by such judgment, be and become due, and that the plaintiff is entitled to an execution for the whole of said amount in a lump sum upon such default."

The defendants appeal from these orders, and assign each as error.

1. Did the court err in striking the defendants' petition from the files? In order to properly answer this question, it is necessary to analyze the petition. It states that since the judgment was rendered evidence has been discovered to prove two facts; one that the plaintiff acted fraudulently when he procured the judgment against the defendants; and the other that the plaintiff's injuries, since they are healed, in no way interfere with his earning capacity. Assuming

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that the defendants' charge of fraud is true, and that it can be established, it cannot have any effect on the plaintiff's right to recover. The judgment contemplates that the plaintiff has the right to quit the defendants' employ at any time that he may choose so to do, and the judgment likewise contemplates that the defendants may discharge the plaintiff whenever they desire. In either event, the defendants must pay to the plaintiff compensation at the rate of four dollars a week. Neither party can compel the other to continue the employment under the judgment, and no judgment could have been legally rendered by which such an employment could be enforced. It has been held that—

"An employee partially incapacitated by an injury from performing his labor does not lose his right to compensation under the workmen's compensation act by remaining in the employment of his master at his former wages." (*Gailey v. Manufacturing Co.*, 98 Kan. 53, syl. ¶ 2, 157 Pac. 431.)

The court reached its conclusion concerning the plaintiff's incapacity to labor after hearing all the evidence that was available at the time of the trial. The degree of the plaintiff's incapacity could not then be definitely ascertained. Not until the entire period has expired for which compensation is allowed can it be definitely and certainly known what is the degree of incapacity caused by any injury. Section 5906 of the General Statutes of 1915 contemplates that this fact cannot be definitely fixed. The plaintiff was injured on October 31, 1913; judgment was rendered on March 27, 1916, and the order from which this appeal is taken was entered on April 16, 1917. During that time economic conditions changed, and wages greatly increased. At the time the last order was made there was great demand for laborers, and any one who could work could receive good wages. If during that time the demand for labor had not changed, probably the plaintiff could not have secured employment except at reduced wages.

The fact that the plaintiff, after he quit the employ of the defendants, was employed in a like capacity for other parties at a more remunerative wage does not defeat his right to recover under the workmen's compensation act. In *Sauvain v. Battelle*, 100 Kan. 468, 164 Pac. 1068, this court said:

"It is settled that when one is totally or partially incapacitated for hard manual labor he is not to be denied compensation because he ob-

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tains employment, even at better wages, at a task which he is physically able to perform." (p. 471.)

(See, also, *Gailey v. Manufacturing Co.*, 98 Kan. 53, 157 Pac. 431; *Dennis v. Cafferty*, 99 Kan. 810, 163 Pac. 461.)

Neither of the facts urged, nor both together, if proved, would relieve the defendants from paying to the plaintiff the compensation fixed by law. The petition did not state facts sufficient to compel the court to grant a new trial.

2. Did the court commit error in sustaining the plaintiff's motion to enforce the judgment? To answer this question all that is necessary to say is that, even after the plaintiff quit the employ of the defendants, they should continue the payment of \$4 a week. The court, when the plaintiff and the defendants were before it in the present action, rendered the judgment that could have been rendered on the trial. It was not error for the court to make the order to enforce the judgment and to compel the defendants to pay the entire compensation at one time if they refuse at any time to make the payments.

The judgment is affirmed.

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No. 21,420.

SCHOOL DISTRICT NO. 36 OF MONTGOMERY COUNTY, *Appellant*,  
V. THE BOARD OF EDUCATION OF THE CITY OF INDEPENDENCE,  
*Appellee*.

## SYLLABUS BY THE COURT.

CITY SCHOOL DISTRICT—*Annexing Adjacent Territory—Proceedings Regular*. Under section 9129 of the General Statutes of 1915, territory outside a city of the second class, but adjacent thereto, may be annexed to the city school district on application of a majority of the electors in the territory proposed for annexation; and it is not necessary to exclude from such annexation any particular tract in such territory merely because no person owning or residing thereon joined in the application for annexation; nor is the validity of the proceedings affected by the fact that the school district from which the territory was detached had no notice of the application nor of the resolution annexing it to the city school district.

Appeal from Montgomery district court; JOSEPH W. HOLDREN, judge. Opinion filed April 6, 1918. Affirmed.

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School District v. Board of Education.

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*J. D. Brown*, of Independence, for the appellant.

*S. H. Piper*, and *Walter L. McVey*, both of Independence, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff brought this action to annul certain proceedings of the defendant board whereby certain territory adjacent to the city of Independence was annexed to the city school district in 1911. The proceedings were undertaken pursuant to section 9129 of the General Statutes of 1915 which, in part, reads:

"Territory outside the city limits, but adjacent thereto, may be attached to such city for school purposes, upon application to the board of education of such city by a majority of the electors of such adjacent territory; and upon the application being made to the board of education, they shall, if they deem it proper, and to the best interests of the schools of said city and territory seeking to be attached, issue an order attaching such territory to such city for school purposes, and to enter the same upon their journal; and such territory shall from the date of such order be and compose a part of such city for school purposes only, and the taxable property of such adjacent territory shall be subject to taxation, and shall bear its full proportion of all expenses incurred in the erection of school buildings and in maintaining the schools of the city."

Plaintiff's petition, which was filed in March, 1917, set up a copy of the application of a majority of the electors of the territory adjacent to Independence which was sought to be attached. A copy of the resolution of the defendant board was also attached. It recited that the application had been signed by more than three-fourths of the electors owning property and residing upon the territory affected. The resolution granted the application and changed and enlarged the boundaries of the city school district accordingly. The county superintendent was notified and recorded the change of boundaries. All these matters were completed in September, 1911.

Plaintiff alleged that defendant's acts were without authority of law; that part of the territory annexed was in Independence township, and part in Drum township—in the latter a quarter section of land was worth \$11,000 and with railroad and pipeline property, etc., located thereon worth \$48,000; that no notice of the proposed change of boundaries was given to the



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plaintiff. [The petition infers, but does not specifically allege, that the land affected by the annexed territory, or the particular quarter section complained of, had theretofore been part of School District No. 36.] The petition alleged that the application for the change of boundaries,

"was not signed or claimed to be signed by any elector or voter or resident or property owner residing within School District Number Thirty-six or within Drum Creek Township, Montgomery County, Kansas. That no person signing the said petition had any interest, directly or indirectly, in said one hundred sixty-acre tract or any property located thereon. That each and every person signing the petition resided on territory North of the City of Independence and North of School District Number Five [the city district] while the said one hundred sixty-acre tract is located East of the City of Independence and east of School District Number Five."

The prayer of the petition was for a recovery of the taxes collected on the quarter section in question, and for a decree annulling the annexation proceedings.

Defendant's demurrer was sustained, and that ruling is here for review.

This mere statement of the cause of action virtually disposes of plaintiff's case. The defendant board had statutory authority to annex the territory. (§ 9129, *supra*.) The board had power to determine whether the application was sufficiently signed by the persons concerned. (*The State, ex rel., v. City of Atchison*, 92 Kan. 431, 140 Pac. 873; *The State, ex rel., v. City of Harper*, 94 Kan. 478, 146 Pac. 1169; *The State, ex rel., v. City of Victoria*, 97 Kan. 638, 156 Pac. 705.)

The fact that the application was not signed by any person residing on the particular quarter section the annexation of which by the defendant so greatly depleted the plaintiff's revenues did not affect the defendant's power to attach that quarter section. The statute does not limit the annexation to the lands of those desiring annexation; a majority is sufficient. So long as the territory proposed for annexation is an integral tract of land adjacent to the city it may be lawfully annexed, if a majority of the electors of the territory affected so desire, at the option and discretion of the board of education, and with due regard to the welfare of the schools under the board's control. The statute authorizing annexation does not intimate that the board of education may annex part of the territory

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which is proposed for annexation and leave out isolated tracts here and there throughout its extent because the owners may object or because some such tracts may have no resident electors; nor need the board of education concern itself that the territory to be annexed may lie in different townships or in different school districts. If the latter have any redress it is by appeal from the proceedings of annexation; and it does not lie in an independent action by the school district begun several years afterwards. The state alone may challenge the proceedings in such an independent action. (*Telephone Co. v. Telephone Association*, 94 Kan. 159, syl. ¶ 1, and pages 162, 163 and citations, 146 Pac. 324.) The statute authorizing the annexation makes no provision for notifying a school district of a proposal to detach part of its territory for the purpose of annexing it to a city school district. Probably the law is lame in that respect, but its crudeness or inconsiderateness does not necessarily render it void, nor vitiate proceedings taken in compliance with its terms.

The judgment is affirmed.

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No. 21,429.

CHARLES W. SMITH, *Appellant*, v. JOHN PARMAN et al., (JOHN W. MORHAIN and ALBERT W. FOX, *Appellees*).

## SYLLABUS BY THE COURT.

1. **MALICIOUS PROSECUTION—Action Barred—Statute of Limitations.** In an action for malicious prosecution, the first count of the petition is held subject to demurrer because the action was barred by the one-year statute of limitations. (Civ. Code, § 17, subdiv. 4.)
2. **SAME—Action Barred—Statute of Limitations.** The second count of the petition is held barred because an amendment alleging that defendants gave false testimony at the trial which resulted in plaintiff's conviction, brought in a new and different cause of action, and, having been filed more than one year after the cause of action accrued, it was too late.
3. **SAME—Conviction in Police Court—Conclusive of Probable Cause.** The third count of the petition is held to state no cause of action, because it shows that the prosecution of plaintiff resulted in his conviction; notwithstanding his appeal and acquittal in the district court, the conviction in the police court is conclusive of probable cause.

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Smith v. Parman.

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Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Affirmed.

*C. T. Atkinson*, of Arkansas City, for the appellant.

*John Parman*, of Arkansas City, for the appellees.

The opinion of the court was delivered by

PORTER, J.: This is an appeal from a judgment sustaining a demurrer to the plaintiff's petition.

The action was one to recover damages for malicious prosecution. A plea in abatement by Parman, alleging that he acted in the matter as city attorney, resulted in a dismissal of the case as to him, which ruling was affirmed when the case was here before. (*Smith v. Parman*, 101 Kan. 115, 165 Pac. 663.) The case then proceeded against the other two defendants. The plaintiff filed an amended petition on the 5th day of May, 1916, and the only question involved is whether the demurrer to it was rightly sustained. The petition contains three counts. The first alleges that on September 14, 1914, the defendants maliciously caused the plaintiff's arrest, whereby he was detained at the police headquarters in the city of Arkansas City without probable cause and compelled to pay a fine of \$5.00. This cause of action was barred by the statute which requires actions for malicious prosecution to be commenced within one year from the time the cause of action shall have accrued. (Civ. Code, § 17, Gen. Stat. 1915, § 6907.) Moreover, it shows a judgment of conviction, without even alleging that an appeal had been taken therefrom, and the judgment was conclusive of the fact that probable cause existed.

The second count makes the averments of the first a part thereof, and alleges that on September 14, 1914, the defendants maliciously and without probable cause filed a complaint before the police judge charging plaintiff with operating an automobile through the streets at a rate of speed in excess of six miles per hour contrary to a city ordinance; that plaintiff was arrested, brought before the police judge and forced to give a bond in order to keep from being placed in jail; that after his conviction he appealed to the district court where, on the 6th day of March, 1915, he was acquitted by a jury.

Thus far the averments follow substantially those of the

original petition, although there appears some attempt to lay stress upon the existence of a conspiracy between the defendants, but the original petition charged that the defendants conspired together. The principal amendment consists of a statement that defendants gave false testimony in the police court, upon which the plaintiff was convicted; that having taken an appeal in order to escape the judgment, the defendants gave perjured testimony at the trial in the district court. In the original petition it was alleged in this count that defendant Morhain testified falsely against plaintiff on the trial in the district court; but there was no statement that either of the defendants had testified falsely before the police judge. The plaintiff insists that no new or different cause of action is brought in by the amendment; that it merely amplifies and makes more specific the averments of the original petition, within the rule declared in *Railroad Co. v. Sweet*, 78 Kan. 243, 96 Pac. 657, and cases cited in the opinion. The plaintiff was confronted with the proposition that his conviction in the police court established the existence of probable cause, notwithstanding his acquittal in the district court. In *Cooley on Torts*, 2d ed., page 185, it is said:

"If the defendant is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause."

To the same effect is *Whitney v. Peckham*, 15 Mass. 243; *Griffis v. Sellars*, 2 Dev. & Bat. (N. C.) 492; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md. 461, where it was said:

"A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise, in every case of reversal, an action would lie for the institution of the original suit." (p. 463.)

(See, also, *Adams v. Bicknell*, 126 Ind. 210; *Boeger v. Langenberg*, 97 Mo. 390, and Note to the same case, 10 Am. St. Rep. 322.)

It has been held, however, that an exception to this rule obtains where the conviction was secured by false testimony or fraud.

In *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141, it was held that—

"The judgment of the court, in favor of the plaintiff, is conclusive proof of probable cause for the prosecution of the suit alleged to be

malicious, notwithstanding its subsequent reversal by an appellate court, unless it is shown to have been obtained by means of fraud." Syl. § 3.)

In *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, it was said in the opinion:

"Again, while a conviction is generally conclusive of probable cause, yet it may be overcome by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution." [Citing authorities.] (p. 554.)

It seems altogether probable that the amendment to the second count was made for the purpose of introducing an element which had been omitted from the original petition, in order to escape the doctrine that the conviction in the police court established the existence of probable cause. It can hardly be said, therefore, that the amendment merely amplified the statements already contained in the original petition. Our conclusion is that the amendment came too late.

The third count alleges that the defendants on the 3d day of March, 1915, wrongfully, unlawfully, and maliciously arrested plaintiff and took him before the police judge, where, in order to obtain his freedom until the day of the trial, he was compelled to give bond for his appearance and to employ counsel; that he suffered the humiliation of a public trial, after which he was discharged and now stands fully acquitted. The statement that he was arrested and taken before the police judge on the 3d day of March, 1915, we assume to be a mistake, because the averments of the other counts in the petition and the exhibits are made a part thereof, and these show that the arrest was made in September, 1914. No cause of action was stated in this count, because, notwithstanding the acquittal in the district court, the conviction in the police court is conclusive of probable cause.

The judgment is affirmed.

No. 21,431.

THE GUARANTY INVESTMENT COMPANY, *Appellee*, v. S. A. GAMBLE et al. (MAUDE MONSEY, *Appellant*).

## SYLLABUS BY THE COURT.

1. *PROMISSORY NOTE—Oral Agreement Varying Written Indorsement—No Defense.* A claim by the payee and indorser of certain negotiable promissory notes, that it was orally agreed that if she sold the notes for fifty cents on the dollar—which she did—she would never be called on to pay or be held responsible, is a variance from the written indorsement and constitutes no defense.
2. *SAME—Bill of Particulars—States No Cause of Action.* A bill of particulars setting out such notes with proper allegations to show liability, except an averment of notice of dishonor or waiver thereof, states no cause of action against the indorser.
3. *SAME—Erroneous Judgment.* It was error to render judgment for the plaintiff on such bill of particulars and a statement of the oral agreement referred to in the first paragraph hereof.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Reversed.

C. T. Atkinson, of Arkansas City, for the appellant.

John Parman, of Kansas City, for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued on six promissory notes indorsed by the payee before maturity. The bill of particulars alleged the execution, indorsement before maturity, and the failure to pay when due, setting out copies. On reaching the trial on appeal in the district court the attorney for the payee stated that when she sold the notes to the plaintiff it was with the express oral agreement that if she sold them at fifty cents on the dollar, which she did, she would never be called upon to pay or ever be held responsible. The plaintiff moved for judgment on the pleadings and statement of counsel, which motion was sustained, and the payee and indorser appeals.

Of course the alleged oral agreement constituted no defense, being a plain variance from the terms of the written indorsement which bound her upon its dishonor and notice to pay the "amount thereof." (Gen. Stat. 1915, § 6593.)

It is contended by counsel for the plaintiff that the question of want of notice of dishonor was not raised in the court below, but in what is called the abstract and brief of the appealing defendant it is recited that:

"The defendant, Mrs. Maude Monsey, through her lawyer stated that the bill of particulars did not state a cause of action against her for the reason that she was given no notice as required by the Statutes of Kansas."

We have sent for the transcript, and the opening statement therein shown contains no reference to the notice of dishonor or lack thereof.

Section 6617 of the General Statutes of 1915 provides that when a negotiable instrument has been dishonored by nonpayment any indorser to whom such notice is not given is discharged.

In the cited case of *Brenner v. Weaver*, 1 Kan. 488, the indorsement was in these words: "For value received, I promise to pay the within mentioned money to Hartman & Weaver." This was held to be an absolute undertaking and not a guaranty. The indorsement was not made by the payee, but by a third party.

Section 6593 provides that an indorser without qualification warrants that on due presentment the note shall be paid, and then if it be dishonored "and the necessary proceedings on dishonor be duly taken," he will pay.

There is nothing on the face of the note or in the bill of particulars to indicate that notice of nonpayment had ever been given or waived. Hence, it was error to enter judgment on the pleadings and statement of counsel. (*Malott v. Jewett*, 1 Kan. App. 14; 3 R. C. L. 1147, § 362; *Hough v. State Bank*, Ann. Cas. 1912D, 1200.)

The judgment is reversed and the cause remanded for further proceedings.

No. 21,432.

W. R. WILSON and CLARA I. JORDAN, *Appellees*, v. S. P. CHANNELL et al. (THE RUSH MANUFACTURING COMPANY, *Appellant*).

## SYLLABUS BY THE COURT.

1. DESCENTS AND DISTRIBUTIONS—*Indebtedness of Heir to Ancestor—Equitable Distribution of Estate*. An indebtedness owing by an heir to his ancestor, remaining unpaid on the final settlement of the estate, constitutes an equitable lien upon such heir's distributive share of the real property belonging to the estate, superior to the lien of a judgment existing and docketed against him at the time of the death of his ancestor; and, after such final settlement, the interests of the other heirs in the real property are paramount to the lien of the judgment creditor.
2. SAME—*Statute of Limitations*. Such a claim as that mentioned in paragraph 1 of this syllabus is not affected by the statute of limitations.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Affirmed.

C. T. Atkinson, of Arkansas City, for the appellant.

W. L. Cunningham, and H. S. Hines, both of Arkansas City, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: Defendant The Rush Manufacturing Company appeals from a judgment in favor of the plaintiffs quieting title to real property in Arkansas City. Martha A. Wilson died intestate owning the real property in controversy and owning personal property of the value of about \$60. She left surviving her, as her heirs, H. O. Wilson and the plaintiffs, W. R. Wilson and Clara I. Jordan. H. O. Wilson was indebted to Martha A. Wilson, at the time of her death, in a sum equal to more than one-third of the value of the real property. That indebtedness had been due for more than three years prior to her death. Some time prior thereto, defendant The Rush Manufacturing Company recovered a judgment in the district court of Cowley county against H. O. Wilson for \$192.15, and costs \$163.25. At the time of the commencement of the present action, the estate of Martha A. Wilson had been fully administered and closed as provided by law.



The final order of distribution made by the probate court contains the following:

"The court further finds that the said Martha A. Abshear [Martha A. Wilson] left surviving her as her only heirs the said W. R. Wilson (sometimes called W. Robert Wilson) of Arkansas City, Kansas, H. O. Wilson of Arkansas City, Kansas, and Clara I. Jordan of Sommers, Arkansas, and that the said H. O. Wilson, at the time of the death of the said Martha A. Abshear, his mother, and ever since was and has been indebted unto her and unto said estate in the sum in excess of any interest which he might have therein, and that by reason thereof, he has no interest in said estate, and had no interest at the time of the death of his said mother, that said H. O. Wilson has quitclaimed all of his right and title in and unto all of said real estate and disclaimed any interest in and unto all personal property, in full settlement and liquidation of the claim which said estate had against him, and is fully released and discharged therefrom, and has no interest and had no interest at the time of the death of his mother in her estate.

"It is therefore considered, ordered and adjudged by the court that the said W. R. Wilson and Clara I. Jordan are the sole heirs of the deceased, and the sole owners of said estate and property both real and personal, and that all other persons here and after claiming or pretending to claim an interest in said estate be forever barred."

The plaintiffs claimed to be the owners of all the real property in controversy and claimed to be in possession thereof. The Rush Manufacturing Company set up its judgment against H. O. Wilson, and claimed that the judgment was a lien on the real property inherited by him.

1. Did the judgment in favor of the Rush Manufacturing Company become a lien on the real property inherited by H. O. Wilson, prior to any claim of the estate of Martha A. Wilson, on account of the indebtedness to her from H. O. Wilson, and for that reason, prior to any claim or interest in the property held by the plaintiffs? Some observations concerning undisputed principles of law may assist in correctly answering this question. By section 7320 of the General Statutes of 1915, a judgment of the district court is a lien on the real estate of a judgment debtor within the county in which the judgment was rendered. This lien attaches to the interest of the judgment debtor, and to nothing more. An heir has no interest in his ancestor's real property; but, when the ancestor dies intestate, that property descends at once to the heir. Advancements are recognized by statute and must be

considered in the final distribution of the estate of the deceased person.

There are two lines of authorities concerning the right of a creditor to look to the real property inherited by his debtor, where that debtor owed his ancestor an amount in excess of the value of the property inherited. Each line of authorities is supported by good reasoning. The leading case supporting the right of the creditor as against the estate is *Marvin v. Bowlby*, 142 Mich. 245. After citing and analyzing numerous decisions on this question, the Michigan court said:

"We therefore hold that the distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness either as against the land or the proceeds of the sale thereof in the hands of the administrator; that such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate." (p. 256.)

Probably the best-considered case on the other side is *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, where it was held that an indebtedness owing by an heir to the estate constitutes a prior equitable lien on the heir's distributive share of the real estate, as against the liens of judgments docketed against him. The court said:

"With due deference to the opinion of the Michigan court, we think the great weight of authority, as well as the better reasoning, is opposed to its holding in *Marvin v. Bowlby*, 142 Mich. 245." (p. 159.)

The facts stated in *Stenson v. H. S. Halvorson Co.* are very similar to the facts in the present case. In the *Stenson* case the contest was over real property, between creditors of a debtor heir and another heir of their common ancestor to whom the judgment debtor was largely indebted. The county court, the court having jurisdiction in North Dakota, directed that the judgment debtor's distributive share of the estate be applied on his indebtedness to that estate; and the supreme court held that the county court had jurisdiction to make such an order, and cites *Holden v. Spier* 65 Kan. 412, 70 Pac. 348, where this court said:

"The probate court, having jurisdiction to make settlement and distribution of a decedent's estate, may determine the share of each distributee, and to that end can inquire into and determine the indebtedness of the distributee to the estate and order a deduction of the same from his share." (syl. ¶ 1.)

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This principle was followed in *Head v. Spier*, 66 Kan..386, 71 Pac. 833, where this court further said:

"The heirs of a decedent, whether lineal or collateral, take their distributive share of the estate subject to all existing equities in favor of the estate against them personally and against any of those through whom they inherit." (syl.)

These Kansas cases follow the same reasoning as that found in *Stenson v. H. S. Halvorson Co.*, but both Kansas cases arose over the distribution of personal property. A number of cases make a distinction between personal and real property, so far as the application of the principle now being discussed is concerned. There is no substantial justification for a less equitable rule in favor of the estate, so far as real property is concerned, than there is for the rule, acknowledged by almost all the authorities, concerning personal property. If, in the distribution of personal property, a distributee who is a debtor of the estate gets an advantage over the other distributees, because his debt is not deducted from his distributive share, then the inheritor of real property likewise gets an advantage over the other inheritors if his debt to the estate cannot be in some way deducted from the share of real property which he receives. The equities which compel the rule concerning personal property are just as strong in favor of the same rule concerning real property.

The statute under which the North Dakota case was decided reads:

"The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court and to the possession of any administrator appointed by that court for the purpose of administration." (Revised Codes of North Dakota [1905], § 5186.)

The language used in the North Dakota statute is different from that used in ours; but the result is the same. With us, personal property descends to the heir the same as real property, with this exception, that the administrator must take possession of the personal property and use that property first for the payment of the debts of the decedent. The administrator may sell the real property for the payment of those debts, if there is not sufficient personal property.

The court concludes that the indebtedness of H. O. Wilson should, in some way, be deducted from his distributive share

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of the real property, and concludes that the rights of the estate, and, therefore, the rights of the plaintiffs, are paramount to the lien of the Rush Manufacturing Company. This conclusion is supported by numerous decisions, and by a note found in 7 A. & E. Ann. Cas. 564, also by 11 R. C. L. 247.

2. It may be contended that the claim of the estate against H. O. Wilson was barred by the statute of limitations. In *Holden v. Spier*, 65 Kan. 412, 70 Pac. 348, this court said:

"The equitable right to retain the debt of a distributee from his distributive share is not affected by the lapse of time, and the deduction of the debt should be made, although an action to recover the same would be barred by the statute of limitations." (syl. ¶ 2.)

(See, also, *Goodnough v. Webber*, 75 Kan. 209, 88 Pac. 879.)

The statute of limitations cannot be set up to defeat the rights of the plaintiffs.

The judgment is affirmed.

JOHNSTON, C. J., PORTER, and WEST, JJ., dissent.

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No. 21,437.

P. J. DOWNES and J. A. KEATING, Partners, etc., *Appellants*,  
v. W. A. ROGERS, *Appellee*.

SYLLABUS BY THE COURT.

**SALE—Farm Tractor—Agency of Salesman Established.** Record examined, and the evidence held sufficient to prove that the vendor of a farm tractor was the plaintiffs' agent; that the agent received from the purchaser the price of the machine; and plaintiffs' action against defendant to collect payment a second time was properly defeated.

Appeal from Reno district court; FRANK F. PRIGG, judge.  
Opinion filed April 6, 1918. Affirmed.

C. M. Williams, and D. C. Martindell, both of Hutchinson,  
for the appellants.

Aaron Coleman, of Hutchinson, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiffs brought this lawsuit to compel the defendant, a Reno county farmer, to pay a second time for a farm tractor purchased by defendant from the plaintiffs' sales agent at Hutchinson.

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Plaintiffs contended below and still contend that the sales agent had no authority to sell the tractor or to accept payment therefor; that the sales agent was only a bailee of the tractor, and that he could only part with it after procuring the consent of a Hutchinson bank; and that such consent would only be forthcoming upon the payment of the whole-sale price to the plaintiffs' account in the bank.

Whatever may have been the private or confidential business relations between the plaintiffs and the sales agent, the defendant showed by competent evidence, amply sufficient to sustain the verdict and judgment, that the plaintiffs had established the sales agent in Hutchinson to sell tractors, and that they had held him out to defendant and to the general public in that community as their agent. Defendant was not apprised of any restriction placed by plaintiffs on the agent's authority. It would utterly destroy the foundations of all business confidence between dealers and customers to countenance a claim like the one set up in this case.

A quibble is raised that the agent did not sell the tractor to defendant, but traded it to him for some mules. The defendant told the plaintiffs' agent that if he, the defendant, could sell some mules he would buy the tractor. The agent brought a mule buyer who purchased \$450 worth of mules from the defendant. The check for the mules and the defendant's check for the balance of the price of the tractor were then delivered to and cashed by plaintiffs' agent and the defendant received the tractor pursuant thereto.

By rights this case should be disposed of in a *per curiam* opinion, for no shadow of error appears in the record, nor is anything presented which is worthy of comment.

Affirmed.

No. 21,438.

THE LANTRY CONTRACTING COMPANY, *Appellee and Appellant*,  
V. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,  
*Appellant and Appellee*.

## SYLLABUS BY THE COURT.

1. **REFERENCE—*Report of Referee—Motion—Appeal Taken in Time.*** The defendant, having filed a motion addressed to the district court within three days after the decision of the referee, which motion was overruled less than six months before the appeal was taken, is entitled to a review of the rulings mentioned in that motion, although the referee previously disposed of a motion for a new trial filed before him more than six months prior to the taking of the appeal.
2. **ARBITRATION—*Partiality of Arbitrator—Decision Not Binding.*** An arbitrator is the agent of both parties concerned, and where he misconceives the functions of his agency and proceeds on the theory that he is the special agent of one of them and endeavors to secure a result favorable to that one at the expense of the other his decision is not binding, however honest his motives may have been.
3. **CONTRACT—*Building Tunnel—Payment for "Extras" Demanded.*** The contract for building a tunnel provided that if extras were furnished for which prices were not fixed in the contract no payments should be made for them unless they had been ordered in writing by the chief engineer of the defendant. Under the plans, the framework of the roof of the tunnel was to be supported by posts resting on the floor. The parties decided that it would be better to have short posts niched into the walls of the tunnel instead of using longer ones resting on the floor of the tunnel, it being agreed that the cost of the work of cutting the niches for the short posts was equal to the difference between the cost of the long and the short posts and should be paid for as lumber. *Held*, that such work was not an extra within the meaning of the contract.
4. **SAME—*Orders for "Extras" to be in Writing—Blueprint Sufficient.*** When the chief engineer ordered that posts should be reset in trenches with concrete foundations, instead of on the floor of the tunnel, and furnished a blueprint showing the plan of that work, it is deemed to be sufficient to meet the requirement that extra work must be done on a written order.
5. **SAME—*Engineer's Estimate—Objections to be Presented in Ten Days—Failure Excused.*** One of the provisions of the contract was that if the contractor claimed that the chief engineer in his final estimate had failed to consider or allow for work or material, objections should be presented by the contractor in writing within ten days after the estimate was made, and it is held that in view of the things said and done by the chief engineer the failure of the contractor to present

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formal objections in writing within the ten-day period does not preclude a recovery on such items.

6. *SAME—Partial Payment Made—Not Accord and Satisfaction.* A final estimate with a voucher attached was sent by the chief engineer of the defendant to the contractor, without any accompanying statement, which voucher was signed by the contractor as "received on account." No check or money was tendered with the statement, and after the indorsement of the contractor qualifying the acceptance the defendant paid and the contractor received the amount named in the estimate. *Held*, that the payment and acceptance of the money cannot be regarded as an accord and satisfaction.
7. *SAME—Amendment to Petition—No New Cause of Action Stated.* The several breaches of the entire contract upon which the action was brought constitute only a single cause of action, and an amendment to the petition made more than five years after the tunnel was finished, setting up an additional item furnished under the contract, is not barred by the statute of limitations.
8. *SAME—Ambiguous Contract—Explained by Circumstances.* The terms of a contract being ambiguous and open to more than one interpretation, testimony of the circumstances surrounding the execution of the contract may be admitted to aid in its interpretation and in ascertaining the intended meaning.
9. *SAME—Findings and Judgment Sustained.* The evidence examined, and held to be sufficient to support the special findings upon which the judgment is founded.

Appeal from Shawnee district court, Division No. 1; ALSTON W. DANA, judge. Opinion filed April 6, 1918. Affirmed.

*William R. Smith, Owen J. Wood, Alfred A. Scott*, all of Topeka, and *William Osmond*, of Great Bend, for the appellant.

*F. Dumont Smith*, of Hutchinson, and *R. F. Hayden*, of Topeka, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action by the Lantry Contracting Company against the Atchison, Topeka & Santa Fe Railway Company, to recover compensation claimed for certain extra items of work done, material furnished, and expenses incurred in the construction of the Raton tunnel on the defendant's railroad, for which payment had not been made. The case was tried by a referee, and on February 21, 1916, he returned findings of fact and conclusions of law which were in favor of plaintiff as to three items of its claim. After over-

ruling defendant's motion for a new trial and certain exceptions made by each party to the findings, the referee, on February 22, 1916, filed in the district court his report of the proceedings before him, including his decision. The next day defendant filed in that court its motion for a new trial, as well as certain exceptions to the findings and conclusions of the referee, and on the following day plaintiff filed certain exceptions to the findings and conclusions of the referee. These pending in the district court until January 15, 1917, when the motions were all denied, the report of the referee was confirmed, and judgment was rendered thereon in favor of plaintiff. Two days later the defendant filed another motion for a new trial, which the court denied, and on May 21, 1917, the defendant appealed to this court. A cross appeal is taken by plaintiff from the order of the trial court overruling certain of its exceptions to the findings and conclusions of the referee.

Plaintiff contends that the questions presented are not open to review, because the appeal was not taken within six months after the motion for a new trial was decided. The original abstract failed to show the filing of the motion for a new trial addressed to the court on February 23, 1916, two days after the decision by the referee. When attention was called to the omission, a supplemental abstract was filed showing the filing of the motion on the day stated, and further, that it had been presented to the court and taken under advisement on July 6, 1916, and that a decision overruling the motion was made on January 15, 1917, about four months prior to the taking of this appeal. The grounds of that motion include all the questions that are raised on this appeal, and hence they may be reviewed.

The referee found, and the court adjudged, that the plaintiff was entitled to recover \$15,646, over and above the allowance made and paid by the defendant, with interest from July 10, 1909, amounting in all to \$22,895.16. This award included an item of \$2,443.22, with interest thereon, for the setting of stulls, as to which there was an agreement. Another was for \$3,140.50 for resetting posts on new foundations of the tunnel lining, which was done on orders and plans given and provided by the chief engineer of the defendant. Then there



was still another item of \$10,063, with interest, for lumber used in the tunnel beyond that allowed in the final estimate of the chief engineer. A claim was also made by the plaintiff for a large sum expended by it in the transportation of coal, which it insists should have been carried by the defendant without charge; but this claim was disallowed by the referee, and upon this ruling the cross appeal is based.

The contention of defendant is that the claims for extra work and material were to be left to the decision of the chief engineer, who was appointed by the parties to give a final decision upon any disputes that might arise, and who, under the contract, was required to make a final estimate of the amount, quantity, and character of all work and material performed and furnished by the contractor, including extra work and material, and that his decision should be final and conclusive and have the effect of an award; and further, that if the contractor should claim that a mistake had been made in the estimate or decision of the chief engineer the contractor should present its objections in writing within ten days after the final estimate was made. It is contended that the plaintiff had failed to comply with these requirements as to disputed items or to prove that they had been waived by the defendant. The plaintiff, on the other hand, insists that the action of the chief engineer in disallowing its claims was not effective, because he acted as the agent of the defendant and not as an impartial arbiter between the parties, that his decisions were the result of partisanship, and therefore were not binding. There is no claim that the chief engineer acted fraudulently, but merely that he misconceived the functions of an arbiter and failed to understand the duties incumbent upon him, and proceeded on the theory that it was still his duty to act as agent for the defendant and to secure the best terms of settlement that he could obtain for it. The referee found, and we think upon sufficient evidence, that he "mistook his position as that of an agent of the defendant for the purpose of securing a settlement in its interest. He did not in all matters exercise his own judgment, but as to some advised with the legal department of defendant, and held himself subject to the orders of defendant's superior officers, and dictated terms of settlement conditional on the plaintiff beginning or abstaining from suit;

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but there is no evidence that in so doing or in passing on any of plaintiff's claims the engineer was actuated by any fraudulent intent." An arbiter is the agent of both parties alike, and should be as much concerned in the protection of the interests of one party as of the other, giving his decisions with absolute impartiality. Because of his relation to the defendant, the chief engineer seemed to feel that it was incumbent upon him to act as the agent of the defendant in the settlement, much as he would if he had not been named as the arbiter. Although conscientiously honest in his motives, his mental attitude was inconsistent with the state of mind which an impartial arbiter should have. The decision of an arbiter who fails to understand his functions and duties, and who acts as a partisan of one of the parties, is not binding, however honest his motive may be. (*Downey v. Railroad Co.*, 60 Kan. 499, 57 Pac. 101.)

An attack is made on the findings that the plaintiff was entitled to recover on its claims for setting stulls and resetting posts. It is based on noncompliance with the provision of the contract that if extra work is done for which prices were not fixed in the contract the chief engineer should give a written order for the doing of such work and should fix the prices to be paid, and that the obtaining of the engineer's certificate for such work and the prices therefor should be a condition precedent to the contractor's right to be paid therefor, and that nothing should be deemed extra work which could be measured or estimated under the terms of the contract. It appears that part of the construction of the tunnel consisted of upright posts or piles supporting the timbers upon which rested the framework for the roof of the tunnel. In places it was decided to be more convenient and better to substitute, in place of these posts, short pieces of timber called stulls, which, instead of resting upon the floor of the tunnel, were placed in a slanting position and rested in a niche cut in the wall. It was agreed that the stull answered the purpose of a post and that the work of cutting the niche in the rock on which the stull rested was the equivalent of the difference in the amount of lumber between a stull and a post. This difference was treated as lumber and was thereafter carried in the estimate as lumber down to the final estimate. The substitution of one kind of

support for another by agreement cannot be treated as an extra, since the plan did not increase or in anyway affect the price to be paid for the supports. There was not only the agreement that the work of cutting niches should equal the difference between the short and the long posts and should be carried as lumber in the estimates, but for months it was so carried in the regular estimates, and payment thereon was partly drawn by the plaintiff.

In respect to the item allowed for resetting posts, it appears that after the timbers of the tunnel had been placed it was decided that there should be a concrete foundation along the sides of the tunnel in order to support the concrete lining of the tunnel. The chief engineer ordered the work and submitted a blueprint directing how it should be done, and afterwards caused the work to be done under the superintendence of a local engineer. In the contract it was agreed that plaintiff should receive \$45 a thousand for all lumber placed in the tunnel, and after the work was commenced the defendant notified the plaintiff that it would only allow \$25 a thousand for lumber reset or used a second time. A trench along each side of the tunnel had to be made for the foundation for the posts, and as the work proceeded it was necessary to remove and then reset the posts. On the basis of \$25 a thousand feet for lumber used a second time, the plaintiff submitted its claim for the work, and while defendant did pay for the excavation and cement work done under the plan, it refused to pay for the resetting of the posts. A formal writing ordering this extra work was not made, but the blueprint set forth the details of the work and is deemed to be sufficient, under the circumstances, to meet the requirement that extra work must be done under a written order. An explanation of the blueprint was doubtless necessary to a complete understanding of it, and this was furnished by the oral directions of the chief engineer and his assistant under whose supervision the written plans were executed.

There was much contention as to the final estimate and the conduct of the parties with reference to it. It was stipulated that when the chief engineer made a final estimate at the completion of the work any objections of the contractor to it were to be presented in writing within ten days after the estimate

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had been made and certified, and objections not so made should be deemed to be waived. The plaintiff never presented any written objections to the final estimate, but in view of the conduct of the parties the defendant is not in a position to claim a waiver on account of the absence of a formal objection. The tunnel was completed in June, 1908, and up to that time sixteen monthly estimates had been made and proportional payments made thereunder. Several disputes had arisen between the contractor and the chief engineer as to the amount due to the contractor, and correspondence and conversations were frequently had between them on these matters. It appears that the chief engineer did not prepare a final estimate until November 11, 1908, about five months after the completion of the work, and it was not signed nor certified by any one, nor was it given to or shown to any officer of the plaintiff until in January, 1909. At that time it was sent to Mr. Kelly, the chief officer of the plaintiff. Following these transactions, conferences were had and an effort was made to adjust the differences between the parties, and some time after the presentation of the final estimate one claim in dispute, amounting to \$2,400, was adjusted and paid. In a conference with Mr. Kelly, prior to the receipt of the final estimate, the chief engineer, who had made out two estimates, in effect, told Mr. Kelly: Here is the final estimate I am going to make if you are going to sue the company; and if you do not intend to sue, here is the final estimate I am going to make. There was about \$10,000 difference between the two estimates. On June 4, 1909, the defendant sent to Mr. Kelly a paper entitled, "Seventeenth Monthly and Final Estimate," with a voucher attached, which had been O. K'd by the chief engineer and the auditing officers of the defendant, calling for the payment of \$33,072.21 as the balance due the contractor. This was much less than the amount claimed by the plaintiff, and Mr. Kelly signed and returned the estimate and voucher to the treasurer of the defendant on June 8, 1909, but he inserted in the receipt the words, "Received on account." Shortly afterwards the defendant paid the plaintiff the amount named in the voucher with the qualified acceptance, less \$6,000 withheld on account of a garnishment proceeding, and the further sum of \$6,000 that had been paid in January, 1908, to a bank in Paola. Subsequently

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the garnishment was dissolved, and the \$6,000 withheld on that account, and which had been placed in a special deposit, was paid to the plaintiff. In view of the facts stated, and the important one that the chief engineer had abandoned his function as an arbitrator and was acting as the representative or agent of the defendant, the plaintiff was not bound to present his objections on matters in dispute to him within ten days after the receipt of the final estimate or at any other time. The misconception of duty and partisanship of the chief engineer, although innocent, released the plaintiff from any obligation to recognize and treat him as an arbitrator. (*Downey v. Railroad Co.*, 60 Kan. 499, 57 Pac. 101; *Orme v. Burney*, 95 Ga. 418; *Grosvenor v. Flint*, 20 R. I. 21; *Wheeling Gas Co. v. The City of Wheeling*, 5 W. Va. 448; 3 Cyc. 625.)

One of the contentions of defendant is that a final settlement was made, and that when the final estimate with a voucher attached was signed by Mr. Kelly and payment thereon accepted, it constituted an accord and satisfaction which is conclusive on plaintiff. The sending of the estimate and voucher was only a step in the numerous negotiations between the parties as to the amount due for the work. In signing the voucher the defendant was distinctly informed by plaintiff that it would not accept the amount named in the estimate as the amount due, but would accept it as a partial payment. With this qualification and warning the defendant subsequently paid the money specified in the estimate. Under the circumstances, the money was paid and received on account and not as a final and complete satisfaction of the debt. No check or money accompanied the estimate, nor was there any statement with it that the subsequent acceptance of payment would be regarded as payment in full. Nothing connected with the sending of the estimate and the qualified signing of the voucher amounted to an acknowledgment that the payment was to be regarded as a full discharge of defendant's obligation. Besides, the payment was not made or received on the estimate until the fact that the plaintiff would only receive the amount as partial payment had been clearly brought to the attention of the defendant. The case was quite unlike one where a check or money is tendered in full satisfaction of a claim, and where the creditor is informed and bound to under-

stand that if the tender is accepted he will take it as a complete settlement of the claim. The facts herein do not bring the case within the rule of the cited case of *Neely v. Thompson*, 68 Kan. 193, 75 Pac. 117, where the tender was accompanied with acts and declarations which amounted to a condition that if the money be accepted it would be accepted in full satisfaction. Here, as we have seen, the estimate and voucher were not presented on the condition that payment must be accepted in full, if at all, and the money was subsequently paid with a notice that plaintiff did not accept the estimate nor payment as a satisfaction of its claim, and therefore there was no accord and satisfaction.

There is a contention that the item for lumber, brought into the case by an amendment of the petition, and for which an allowance was made, was barred by the statute of limitations. The amendment was filed more than five years after the completion of the tunnel. Objection was made to the amendment on the theory that it set up a distinct claim or cause of action not included in the original petition, and that it could not be tied to the original by the doctrine of relation. The general rule is that when an amendment does not set up a new cause of action the statute of limitations is arrested at the date of filing the original petition. In the original pleading the contract was set forth and its performance by the plaintiff, followed by allegations of the failure of the defendant to comply with its requirements in several particulars, including the failure to furnish transportation of coal and lumber, a failure to pay for extra work and extra lumber for supports made necessary by changes of plans, and also the value of lumber under an agreement as to the stulls already described. Later, and after the trial had commenced, the plaintiff in its amendment alleged that the defendant had not allowed or paid for 227,000 feet of lumber which was used in the construction of the tunnel, and it was asked that this item be added to the judgment. The action was based upon the contract, and the pleading did not purport to contain more than one cause of action. The contract provided for the construction of a tunnel as an entirety, and an action to recover for noncompliance with its terms states only a single cause of action. The fact that the defendant failed to pay for a

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number of the items in the contract does not make it necessary to set up each item as a separate cause of action. Under the contract the defendant became liable for all work and material furnished in the building of the tunnel, and non-compliance with its provisions, although made up of many items, constitutes one cause of action. This was decided in *Comm'rs of Barton Co. v. Plumb*, 20 Kan. 147, an action brought upon a bond given to secure the performance of a building contract, and in which it was alleged that one of the parties failed to build the structure within the agreed time and also failed to provide suitable material in its construction and to do the work in a specified way. The court held that, although the action involved numerous details and many items of noncompliance, the petition stated only one cause of action. It was said that the plaintiff possessed one grand primary right to have the house built according to contract, within which were innumerable subordinate and secondary rights, such as the furnishing of lumber, glass, nails, locks, hinges and the like, and the failure with respect to any of them would be a violation of the plaintiff's rights; "but," it was said, "the violation of each of these special and subordinate rights is also a violation of the more general and primary right, and altogether they constitute only one violation of this grand primary right." (p. 151.) The amendment in question did not present a new cause of action, but only asked an allowance for another item used in the making of the tunnel under the violated contract. The original pleading had asked a recovery of some lumber, and the amendment expanded the cause of action by adding an omitted item in the lumber account, and therefore it relates back to the commencement of the action. In the cited case of *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938, it was said that "it is true, as a general rule, that amended pleadings relate back to the commencement of the action, but this rule never obtains where a separate and distinct cause of action is set up by way of amendment." (p. 691.) Here, however, the amendment does not allege a new cause of action, nor is the item asked for founded on a new right. In such cases the rule as to amendments is liberally applied in this state. For instance, an amendment was allowed of an allegation of an express war-

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ranty under a petition which claimed damages because the property proved to be unfit for the purposes intended. (*Culp v. Steere*, 47 Kan. 746, 28 Pac. 987.) So, also, was one specifying new grounds of negligence in a personal-injury case. (*Railway Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837.) The substitution of a new plaintiff by amendment, it was held, did not change the cause of action, and the statute of limitations did not run against the substituted party during the pendency of the action. (*Service v. Bank*, 62 Kan. 857, 62 Pac. 670; *Harlan v. Loomis*, 92 Kan. 398, 140 Pac. 845.) It was also held that an amendment charging the conversion of the proceeds of personal property, where the original charged the conversion of the property itself, was allowable. (*Bank v. Layfeth*, 63 Kan. 17, 64 Pac. 973.) Some of these and a number of other like authorities are mentioned in *Cunningham v. Patterson*, 89 Kan. 684, 132 Pac. 198, in which an allegation that a death was negligently caused in another state was amended after the period of limitation by setting out the statute of the foreign state authorizing a recovery. In *Madden v. Smith*, 28 Kan. 798, it was held that where there is a single contract, only one action can be maintained for a breach thereof, and a subsequent action for an additional item under the same contract cannot be maintained. In *Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. 508, it was held that all the several breaches of a single and entire contract, after such breaches had actually occurred, constitute only one cause of action, and this although an action might be maintained upon each of such breaches as it occurred and before any subsequent breach occurred. It was held in an action for damages to specific articles of personalty, resulting from a tort, that an amendment may be made by setting forth damages to other articles of personalty caused by the same tort and at the same time. (*City Council of Augusta v. Lombard*, 99 Ga. 282.) Where damages were asked for digging up the bodies of plaintiff's parents and removing them from a cemetery lot and then burying other bodies on the lot, an amendment was permitted after the limitation had run, claiming \$400 damages as the cost of returning the bodies to the lot and restoring the monument and shrubbery on the lot. (*Anderson v. Acheson*, 132 Iowa, 744.) In *Coxe v. Tilghman*,



1 Whar. (Pa.) 281, an amendment assigning new breaches of a contract on which an action had been brought and making an alteration in the grounds of recovery on that instrument and the modes in which the defendant had violated it, was held to be permissible. In *Wilhelm's Appeal*, 79 Pa. St. 120, it was held that a petition asking an account of ores taken from a tenancy in common might be amended seven years afterwards by alleging that ores had been taken from other lands, and it was held that a new cause of action was not alleged and the amendment was not barred. (See, also, *Bond v. Sewing Machine Co.*, 23 Kan. 119; *North Shore St. Ry. Co. v. Payne*, 192 Ill. 239; *Cooper, Adm'r, v. Mills County*, 69 Iowa 350; *Sullivan v. Owens*, [Tex. Civ. App. 1905,] 90 S. W. 690; *Bentley v. Insurance Co.*, 40 W. Va. 729; Notes, 3 L. R. A., n. s., 259, 275; 33 L. R. A., n. s., 196.)

Defendant insists that the evidence was insufficient to sustain the finding of the referee making an allowance for the lumber item, and also as to the other items that were allowed; but, after a critical examination of the evidence, we have no hesitation in saying that the findings of the referee have sufficient support. It is manifest from the findings that the referee gave careful attention to the evidence and that his conclusions were drawn with discriminating judgment.

Plaintiff, in its cross appeal, contends that coal is material, and that under the contract defendant was to furnish free transportation of material required in carrying out the contract. The meaning of the term *material* as used in the contract is not free from doubt, but it is insisted that the exceptions enumerated in the contract as to materials—to wit: feed for teams and men, commissary supplies and explosives—indicate that all other materials than these were to be carried free. In *Philadelphia, Appellant, v. Malone*, 214 Pa. St. 90, a contractor who had undertaken the construction of a reservoir gave a bond which required that all materials furnished for the work should be paid for, and it was held that coal used to generate steam for the operation of a steam shovel and a locomotive in making the excavations was not within the obligation of the bond. Of like import, is *Lyman Coal Co. v. U. S. Fidelity & Guar. Co.*, 82 Vt. 94. Regardless of these

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interpretations, however, there was ambiguity in the contract as to whether coal to be used in the digging of the tunnel was intended to be included in the term *material*, and therefore testimony was rightfully received to aid in ascertaining the intention of the parties. It has been said:

"The intention of the parties to a contract is to be determined primarily by the language employed therein, construed in its ordinary meaning. If a provision be fairly susceptible of two meanings, then the general scope and purpose of the entire transaction and all the surrounding circumstances are to be considered in determining which meaning was intended." (*Brick Co. v. Gas Co.*, 82 Kan. 752, syl. ¶ 2, 109 Pac. 898.)

(See, also, *Brown v. Shields*, 78 Kan. 305, 96 Pac. 351; *Royer v. Silo Co.*, 99 Kan. 309, 161 Pac. 654.)

The testimony introduced was sufficient to satisfy the referee that the term used was not intended by the parties to include the coal used in the excavation. In the negotiations between the parties the bid appears to have been made upon the theory that coal sufficient for the purpose would be found as the excavation of the tunnel proceeded. The evidence was sufficient to sustain the finding of the court that free transportation for coal was not within the contemplation of the parties in the making of the contract.

Other objections are not deemed to be material, and, finding no error in the record, the judgment is affirmed.

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No. 21,439.

LYDIA JEFFRIES, *Appellee*, v. THE FARMERS UNION CO-OPERATIVE MERCANTILE AND ELEVATOR COMPANY, *Appellant*.

SYLLABUS BY THE COURT.

1. "FACTORY ACT"—*Widow May Maintain Action for Death of Husband.* The decision in the case of *Mott, Adm'x, v. Long*, 90 Kan. 110, 132 Pac. 998, holding that when no personal representative has been appointed a widow may maintain an action under the factory act for the death of her husband, approved and followed.
2. SAME—*Grain Elevator, a Factory Within "Factory Act."* A grain elevator, wherein grain coming from the farm in a raw state or condition is converted into an improved form by the processes of elevating, drying, cleaning, and mixing, is a factory, within the meaning of the factory act. (Gen. Stat. 1915, § 5892.)

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3. *SAME—Widow May Not Compromise Action to Prejudice of Infant Child.* A cause of action for the death of a workman, arising under the factory act, may not be compromised by the widow to the prejudice of an infant child entitled to share in the damages recoverable.

Appeal from Rush district court; ALBERT S. FOULKES, judge. Opinion filed April 6, 1918. Affirmed.

*David Ritchie*, of Salina, for the appellant.

*H. L. Anderson*, of La Crosse, *Samuel Jones*, and *Ben Jones*, both of Lyons, for the appellee.

The opinion of the court was delivered by

BURCH, J.: The action was one for damages for death of the plaintiff's husband, prosecuted under the factory act. A demurrer to the petition was overruled, and a demurrer to a portion of the answer was sustained. The defendant appeals.

It is said the action was not maintainable by the widow of the deceased, and should have been prosecuted by a personal representative. The court held otherwise in the case of *Mott, Adm'x, v. Long*, 90 Kan. 110, 132 Pac. 998. An examination of the briefs in that case discloses that all the arguments now presented in favor of the exclusive right of a personal representative were then presented. The court is still of the opinion the legislature had in mind the subject of damages resulting from death occasioned by a violation of the factory act, and did not have in mind a differentiation of procedure by specifically limiting the right to sue to a particular party.

The plaintiff's husband was killed by catching his clothing on an unguarded setscrew in the main shaft of the defendant's elevator. It is contended the elevator, the machinery of which was operated by power from a gasoline engine, was not a manufacturing establishment within the meaning of the factory act. The allegations of the petition relating to the character of the establishment follow:

"In said elevator and by its elevator machinery it manufactures grades of wheat and grain other and different from the grain as actually received into said elevator. That said defendant purchases wheat from the farmers as grown in the fields of Rush county, and dumps the same into its said elevator in different bins, and thereafter mixes said wheat in said elevator, mixing the lighter weights and lower grades of wheat with higher grades and heavier wheat, thereby making a new and better grade

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of wheat by said mixture, and by said process of mixing it improves said lower grades of wheat and makes a new and different grade thereof. After receiving such wheat into said elevator it cleans the same and operates a cleaning machine in said elevator through which wheat purchased by it is caused to pass, and thereby the various shriveled grains, chaff, weed seeds, and other impurities are removed, and the said quality and weight of said grain are improved, and then said wheat is by means of machinery loaded into cars. That by the process of elevating said wheat which it purchases it improves the same by drying, mixing, and cleaning, and the changing the quality thereof, and manufactures from the wheat purchased by it new and better and different grades of wheat. That in such manner defendant carried on a manufacturing industry and establishment and factory, within the meaning of the factory laws of the state of Kansas and within the meaning of the Kansas factory act."

All establishments for the modification of natural products to adapt them to human needs are embraced in the act. (*Caspar v. Lewin*, 82 Kan. 604, 610, 109 Pac. 657.) Grain is not dealt in by individual kernels, but in bulk, by weight and grade, which are affected by a variety of conditions. Using the words of the statute, it is a "natural product" which comes from the threshing machine in a "raw . . . state or condition," and by processes of elevating, drying, cleaning, and mixing, is "converted" into an "improved . . . form." (Gen. Stat. 1915, § 5892.)

The defendant pleaded a settlement with the plaintiff whereby she agreed that if her husband's debts were paid, which was done, she would not sue. The plaintiff has a child entitled to share in the damages recovered. She prosecutes in a representative capacity, and the claim could not be compromised to the prejudice of the infant beneficiary.

The judgment of the district court is affirmed.

No. 21,442.

GLENN A. WARNER, *Appellee*, v. E. O. SNOOK and GEORGE REIGL, *Appellants*.

## SYLLABUS BY THE COURT.

1. SCHOOL LAND—*Islands—Findings of Jury—New Trial Granted—No Error.* In an appeal from an order granting a new trial the appellant contends that the ruling was based solely on the ground that error was committed in giving a particular instruction. It is held that upon the whole record it appears that the new trial was ordered because the trial judge disagreed with the jury in their view of the facts, and therefore the decision is not reviewable.
2. SAME. The fact that the trial court in granting a new trial specifically and formally sets aside, as without any support in the evidence, only a part of the special findings which are attacked, and states that there was some evidence to support the others, does not necessarily show that such approval was given to the latter findings as to justify this court in ordering judgment on them, even if they would be in themselves, if regarded as establishing the facts to which they relate, conclusive of the rights of the parties.

Appeal from Ford district court; LITTLETON M. DAY, judge. Opinion filed April 6, 1918. Affirmed.

*L. A. Madison*, and *Carl Van Riper*, both of Dodge City, for the appellants.

*Edgar Foster*, and *Horace J. Foster*, both of Garden City, for the appellee.

The opinion of the court was delivered by

MASON, J.: In 1914, under the provision of the statute (Laws of 1913, ch. 295) which has since been repealed (Laws of 1915, ch. 322, § 14), Glenn A. Warner settled on a tract of land which he claimed to be open to settlement as school land on account of having formerly been an island in the bed of the Arkansas river. E. O. Snook and George Reigl protested the claim on the ground that the tract was an accretion to their riparian land. A trial was had, in which a jury returned a general verdict in favor of the protestants or defendants and made a number of special findings. The court granted a new trial, and the defendants appeal.

1. The plaintiff invokes the rule that the decision is not open to review, because it rested so largely in the discretion of the trial court. (*City of Sedan v. Church*, 29 Kan. 190.) The defendants insist that the decision is reviewable because it turned upon an unmixed question of law; namely, whether error was committed in the giving of a particular instruction relating to the effect of avulsion upon land titles. In ruling on the motion for a new trial, the judge went over the special findings and announced that several of them were not supported by the evidence and, on that account, would be set aside. He then added:

"I think that instruction No. 6 might have misled the jury in finding that that island did n't exist at a certain time. I think it is pure speculation, but would that be material? . . . I feel that probably the jury was misled by that sixth instruction that was given without any evidence to base it on and I think a new trial ought to be granted in this case. It will be granted."

We do not interpret the record as showing that the new trial was granted solely because of error supposed to have been committed in the giving of the instruction referred to. It seems rather to indicate that the judge could not approve the verdict and findings of fact made by the jury, and by way of explanation as to how they might have formed such mistaken beliefs, or a part of them, suggested that they were probably misled by an instruction which was given without a sufficient basis in the evidence. Even if upon examination of the evidence we should conclude that it justified giving the instruction, we could not order judgment on a verdict which has not received the approval of the trial court. (*K. C. W. & N. W. Rld. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.) There is an intimation in the language quoted, that the court did not regard the effect of the instruction as vital. In this situation, it appearing that the court set aside the verdict because he felt that it was not in accordance with the facts, we can only affirm the order granting a new trial.

2. The defendants argue, with considerable plausibility, that judgment in their favor should be ordered upon the special findings which the court did not set aside, because these findings were in themselves fatal to a recovery by the plaintiffs. One of them was to the effect that no part of the land in dispute originated as an island. That finding, if regarded as es-

tablishing the fact to which it relates, would seem to be conclusive against the plaintiff, and might in some circumstances form the basis of a judgment, although other findings were set aside. (*Goff v. Goff*, 98 Kan. 201, 158 Pac. 26.) In the statement made by the trial judge preliminary to the ruling on the motion for a new trial, he at first said that the evidence clearly showed that the land had been an island at some time; later he said that he had overlooked the fact that the jury might have reached the conclusion they did in this regard from a comparison of the soil, and that, therefore, he would allow the finding to stand. The defendant's argument involves the assumption that what was said amounted to an approval of the finding. Upon the entire record we think it must be treated only as indicating that in the opinion of the judge there was some evidence tending to sustain it. In the course of his oral remarks he designated three findings as not being supported by the evidence, seeming to mean that there was no evidence whatever to support them. These were the only ones which he specifically and formally set aside. Of another he said, "Now there is evidence both ways on that. I think it is sustained by some evidence and that will not be disturbed." Of two others he said that there was sufficient evidence to sustain them, apparently meaning that there was some evidence in their support. There is no statement that any of the findings received the affirmative approval of the trial court. A judgment cannot be rendered upon special findings that have not received such approval (*Swan v. Salt Co.*, 86 Kan. 260, 119 Pac. 871), which must be something more than a mere determination that they were sustained by some positive evidence. (*Butler v. Milner*, 101 Kan. 264, 166 Pac. 478.) The order granting the new trial had the effect of setting aside the findings which had not already been vacated.

The decision is affirmed.

No. 21,443.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,  
*Appellant*, v. H. WAGNER, *Appellee*.

## SYLLABUS BY THE COURT.

1. INTERSTATE COMMERCE—*Bill of Lading—Acceptance by Consignee—Implied Contract to Pay Established Freight Rates.* Where an interstate bill of lading contains any provision authorizing the consignee to pay the freight, an implied contract by the consignee to pay the freight charges arises from his acceptance of the delivery of the goods under the bill, into which contract there will be read the provisions of the Elkins act requiring payment of the full charges in compliance with the duly established rate; and where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges.
2. SAME—*Presumption that Schedule of Rates Was Duly Published.* In a suit by a carrier to recover from a consignee the unpaid balance due for freight charges, where it is admitted that a schedule of rates has been duly filed with and approved by the interstate commerce commission, the presumption, in the absence of any showing to the contrary, is that the rates were duly published, and not that the carrier has violated the provisions of the Elkins act subjecting it to severe fines and penalties for failure to publish the same.

Appeal from Chase district court; WILLIAM C. HARRIS, judge. Opinion filed April 6, 1918. Reversed.

*William R. Smith, Owen J. Wood, and Alfred A. Scott*, all of Topeka, for the appellant.

*Charles E. Davis*, of Cottonwood Falls, *R. M. Hamer*, and *H. E. Ganse*, both of Emporia, for the appellee.

The opinion of the court was delivered by

PORTER, J.: The appellant sues to recover an undercharge of freight amounting to \$34 on a car of cottonseed cake shipped from Bastrop, La., to Bazaar, Kan., and delivered to the appellee who was the consignee. The agreed statement of facts upon which the case was submitted to the court is, that the appellant and its connecting lines upon which the shipment was handled had filed with the interstate commerce commission a schedule



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of rates which had been approved, and which required the payment of \$114 on this shipment; that the charges actually paid by the appellee were \$80; that the merchandise was consigned shipper's order, and appellee was to receive it at Bazaar, freight paid by the consignor; that he accepted delivery and at the request of the consignor paid the \$80, which was the full amount of charges demanded by the appellant, and remitted the balance of the purchase price of the merchandise to the consignor. Upon these facts the court rendered judgment against appellant for costs and overruled a motion for a new trial.

Two reasons are suggested by the appellee in support of the judgment. The first one to be noticed is the claim that the appellant was not entitled to recover, because there was no showing that it had caused the rate filed with the commission to be published. On the other hand, the appellant relies upon the presumption that it took all the necessary steps required by law in establishing the rate. By the Elkins act of February 19, 1903, Part I, 32 U. S. Stat. at Large, 847, a willful failure of the carrier to publish the tariff of rates and charges as filed is made a misdemeanor, and the act declares that upon conviction "the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense."

In *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, it was said:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law." (p. 327.)

(See, also, *New York Central &c. R. R. v. Beaham*, 242 U. S. 148.)

We think the presumption is one upon which the appellant was entitled to rely until it was met by some evidence to the contrary. Besides, the contention is technical; there is no claim that the facts, if shown, would disclose that the schedule of rates had not been duly published. In *Railroad Co. v. Thisler*, 90 Kan. 5, 133 Pac. 539, some countenance was given to the technical rule which the appellee is now invoking, but there the cause was sent back for a trial of the sole question whether the rate had been duly published. The effect of

the presumption that the railway company had not violated the penal statutes was not referred to in the opinion.

The principal contention of the appellee is that the judgment should be sustained because the consignee is not primarily liable for the freight charges, and only becomes liable at all by reason of his acceptance of the shipment; and that the extent of his liability in this case was to pay the amount demanded by the carrier. There are a number of authorities which sustain the contention. The supreme court of Alabama, in *Central of Georgia Ry. Co. v. Southern Ferro Concrete Co.*, 193 Ala. 108, reported with a note in A. & E. Ann. Cas. 1916E 376, held,

"That the mere acceptance and removal of the goods by the consignee, with the knowledge that the carrier is giving up a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay the charges beyond the amount stated. [Citing *Hutchinson on Carriers*, and *Central R. Co. v. MacCartney*, 68 N. J. L. 165.]" (p. 378.)

A number of cases are cited in the note above referred to which are to the same effect. In one of the cases (*Pennsylvania R. Co. v. Titus*, 156 App. Div. 830, 142 N. Y. Supp. 43) the reasons stated seem, at first glance, persuasive. We quote from the opinion:

"Of course, if the consignee accepts the goods, with notice that the carrier has a lien for a specified amount, thereby depriving the carrier of its lien, he becomes obligated by an implied contract to pay the charges. . . . But if the carrier induces him to accept the goods on the theory that the freight charges are as stated, there is no principle upon which he thereby becomes liable to the carrier for the difference between the freight charges thus paid and those which the carrier by law was required to charge." (p. 833.)

These cases concede the rule that, generally, the carrier may look either to the consignor or the consignee for payment of the freight charges, but draw a distinction between a case where the consignee accepts the shipment with knowledge of the undercharges (in which case he is held liable because his act deprives the carrier of its lien on the goods), and those where he is induced to accept the goods on the theory that the freight charges are correctly stated by the carrier. As between the consignee and the carrier the reasoning would appear perfectly sound; but over and above the rights of either

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the consignee or the carrier are the rights of the public, which require that all shippers shall be treated alike. We think the decisions quoted lose sight of the policy of the Elkins act, which compels the carrier in every instance to collect the full amount of the established rate, and which in effect makes the consignee who receives the goods, for all purposes the owner and liable to the same extent as the consignor. To hold otherwise would merely open a door to evasion and unjust discrimination. We may not lose sight of the fact that the carrier does not usually bring actions of this character for the mere purpose of collecting the undercharge, but because the law imposes upon him a severe penalty in case he fails to use every means the law affords to collect the undercharge. In *New Haven R. R. v. Interstate Commerce Com.*, 200 U. S. 361, the present Chief Justice said in the opinion :

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about." (pp. 391, 392.)

In *Armour Packing Co. v. United States*, 209 U. S. 56, it was said in the opinion :

"It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." (p. 72.)

To the same effect see *Railway Co. v. Stannard & Co.*, 99 Kan. 720, 162 Pac. 1176; an action, however, to correct undercharges from a consignor.

The law is well settled that where the bill of lading contains any provision authorizing the consignee to accept the goods and pay the freight an implied contract by him to pay the charges arises from his acceptance of the delivery. The contract is implied "because the consignee knows that the carrier looks to him for the charges and by delivery waives his lien

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therefor, in the faith that the consignee will pay them.” (*Union Pac. R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720, syl. ¶ 1, and cases cited in the opinion.)

We think that in all interstate shipments the Elkins act must be read into the implied contract of the consignee, and that the contract must be held as obligating him to pay the full amount of the legally established rate. In the case last cited the consignee paid less than the legal charges. It was said in the opinion: “The legal presumption is that the plaintiff intended to charge, and the defendant intended to pay, a legal, and not an illegal, amount for this transportation.” (p. 722.)

In *Texas & Pacific Railway v. Mugg*, 202 U. S. 242, the syllabus reads:

“One obtaining from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, less than the schedule rates published and approved and in force at the time, whether he does or does not know the rate is less than schedule rate, is not entitled to recover the goods, or damages for their detention, upon tendering payment of the amount specified in the bill of lading, or of any sum less than the published charges. Whatever may be the rate agreed upon, the carrier’s lien on the goods is, by force of the Interstate Commerce Law, the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee becomes entitled to the goods, only by payment or tender of such amount.”

The effect of the Elkins act appears to be that it makes the consignee who accepts the shipment, the owner for all purposes and liable to the same extent as the consignor.

The judgment is reversed, and the cause is remanded with directions to render judgment for the appellant.

WEST, J. (dissenting) : The petition alleged that the freight charges which should have been legally collected, based on a certain rate as shown by the published tariffs on file with the interstate commerce commission, “and in force and effect and controlling as a legal rate,” were those sued for. If this be deemed equivalent to an allegation that the posting had been properly made because otherwise the tariff could not have been in effect as alleged, it was met, however, by the verified general denial of the defendant, and there was nothing in the agreed statement of facts amounting to an admission that the alleged rate was posted or in effect. In the *Thisler* case it was ex-

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pressly denied that the rates had been filed as required by law, and also expressly denied that any of the railroads concerned "had caused any schedules to be printed and copies for the use of the public posted or kept accessible to the public as required by law." This denial was ignored in the instructions, and the cause was remanded upon the sole question as to whether or not the rate sought to be recovered was legally in force.

There is nothing in the cited Rankin case inconsistent with the Thisler decision. Rankin had signed a bill of lading which recited that lawful alternate rates based on specific values were offered, and the court said:

"And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specific values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him." (*Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 327.)

It was further observed that the bill of lading contained "the conspicuous provisions concerning published rates, tariff regulations. . . ." (p. 328.) The state courts had given no force to this bill of lading, and hence the reversal.

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No. 21,445.

RACHEL LILLARD and MOLLIE E. BLAKEMORE, as Executors, etc., of R. I. MCQUIDDY, deceased, *Appellants*, v. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JOHNSON, *Appellees*.

SYLLABUS BY THE COURT.

1. **ESTOPPEL**—*Consistency of Conduct Required.* The doctrine of estoppel requires of a party consistency of conduct when inconsistency would work substantial injury to the other party.
2. **CONDEMNATION PROCEEDINGS**—*County Warrant Issued—Ownership of Warrant—Arbitration—Estoppel.* A landowner entitled to a warrant for certain condemnation money, instead of demanding its delivery, submitted to the county board the question whether he or his grantee was entitled to such warrant, stating, among other things, that he felt "sure that when the facts are known by you, that no better tribunal can be found to decide our relative rights than your Honorable Body."

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Thereafter the vendee appeared before the board, and upon his showing the warrant was delivered to him. Later the vendor sued the board to recover the amount and value of the warrant. *Held*, that he is estopped.

Appeal from Johnson district court; JABEZ O. RANKIN, judge. Opinion filed April 6, 1918. Affirmed.

*I. O. Pickering*, of Olathe, for the appellants.

*C. L. Randall*, county attorney, for the appellee.

The opinion of the court was delivered by

WEST, J.: A road was ordered opened across the land of R. I. McQuiddy, who presented his claim for damages and was allowed \$600. On October 30, 1915, the board of county commissioners ordered a warrant to be drawn and issued to him for this amount. The petition set out the warrant, and alleged that when it was drawn there was sufficient money in the treasury to pay, but that before the action was begun he demanded payment, which was refused. The board answered by general denial, admitted the execution of the warrant, and alleged that it was held by the clerk to be delivered to the party legally entitled thereto. Further, that about December 16, 1915, McQuiddy sold the property and executed a general warranty deed therefor, of which fact the board had no knowledge until sometime after the execution of the warrant and until the grantee appeared and demanded that it be delivered to him. The board further alleged its clerk communicated with McQuiddy, advising him of the claim of his grantee, whereupon McQuiddy authorized the board to ascertain and decide who was entitled to the warrant and dispose of it accordingly, setting out a copy of his letter in which he said:

"After due deliberation, I have concluded to submit the question of ownership to the \$600.00, awarded me for damages. . . . after a fair and true statement of all the essential facts I desire the said honorable board to decide who should have the money and so dispose of it."

Then followed a statement as to the price and profit on the sale, and the expression,

"I feel sure that when the facts are known by you, that no better tribunal can be found to decide our relative rights than your Honorable Body."

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It was alleged that after receiving this letter the grantee with his attorney appeared before the board, and that the latter in good faith, after hearing the matter, delivered the warrant to such grantee, and did so upon the direction contained in the letter referred to. To this answer a demurrer was filed and overruled. Thereupon a motion was made for judgment on the pleadings, which was also overruled. McQuiddy having died, the case was revived in the names of the plaintiffs as executors, who appeal.

The plaintiffs contend that the county board was the proper tribunal to establish the road and determine to whom the damages were due; that this determination was in favor of the decedent; and that,

"The board had no power to review and revise that decision and award or to sit in judgment in a controversy between rival claimants of a fund in its possession."

The board, Duvall not having been made a party as requested, contends that it is protected in its action by the direction in the McQuiddy letter; that having thus directed he could not repudiate his action, and that he is estopped so to do. It is said that,

"What he did, was voluntary on his part—not even suggested by the Commissioners; having on his own motion voluntarily waived his right to demand payment, surely must be bound by his selection of methods."

We have examined the record and the briefs, as well as the reply brief, and to this complexion must it come at last: When the warrant was drawn McQuiddy was entitled to it; before this suit was brought he had sold the land to Duvall, who appeared before the board and claimed that the warrant should be delivered to him. On receiving this information from the board, McQuiddy recognized that there was a question between him and Duvall as to the ownership of the warrant and substantially requested the board to ascertain the facts and decide accordingly, making it a sort of referee or arbiter to investigate and determine the rights of the grantor and grantee. It appears that the board did exactly what he suggested, and decided in favor of the other party. There is no showing or claim that the board did not ascertain the real facts, or that it did not act in good faith, or do exactly what the grantor

had suggested that it should do. While McQuiddy was under no compulsion to submit this matter to the arbitration of the county board, and while that body had no jurisdiction to decide it, and none could be conferred by the act of the parties, still he voluntarily did so submit it, and the other claimant acting thereon made a showing and won. It does not lie in the grantor's mouth, under these circumstances, to ignore the action of the board, which he thus invoked, and compel it to pay the warrant to him. In other words, under the circumstances shown, the decedent estopped himself by his own conduct to acquire the relief which the executors demand in this case. One who submits a matter to one known to be incompetent to act as arbitrator, and takes the chances of a favorable decision, cannot, after the award, raise the question of incompetency (*Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315); likewise one who has waived the oath of the arbitrators and the swearing of witnesses who appear before them cannot, after the award, raise the question. (*Russell v. Seery*, 52 Kan. 736, 35 Pac. 812.)

The doctrine of estoppel requires consistency of conduct. (*Powers v. Scharling*, 76 Kan. 855, 859, 92 Pac. 1099; *Stark v. Meriwether*, 99 Kan. 650, 657, 163 Pac. 152.)

"Estoppel arises when one by his conduct so misleads another, that the former is not permitted, or, as we say, is estopped from asserting a right which he might otherwise assert. In theory, the person estopped still has the right but cannot assert it." (14 M. A. L. 174.)

"The doctrine of estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit." (10 R. C. L. 694, § 22.)

"An estoppel may be used as a defense against a party who is thus precluded from [by] his act or statement from maintaining his action; or it may be used by the plaintiff to prevent or avoid a defense which is open to a similar objection." (1 Herman on Estoppel and Res Judicata, § 19.)

The order overruling the motion for judgment on the pleadings is affirmed, and the cause is remanded for further proceedings.



No. 21,446.

KATE C. MCKEOWN, *Appellant*, v. FRANK CARROLL, as Executor, etc., of Cornelius Kelly, et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. *CONTRACT—To Make Plaintiff an Heir—Insufficient Evidence.* The evidence did not prove the contract alleged in the plaintiff's petition.
2. *SAME—Findings—Supported by the Evidence.* The findings of fact made by the trial court were supported by the evidence, and no sufficient reason is advanced by the plaintiff for striking out any portion of any finding, or for adding anything thereto.

Appeal from Leavenworth district court; JAMES H. WENDORFF, judge. Opinion filed April 6, 1918. Affirmed.

Arthur M. Jackson, of Leavenworth, William G. Holt, and J. K. Cubbison, both of Kansas City, for the appellant.

A. E. Dempsey, of Leavenworth, E. S. McAnany, and M. L. Alden, both of Kansas City, for the appellees.

The opinion of the court was delivered by

MARSHALL, J.: The plaintiff seeks to compel the specific performance of a contract by which Cornelius Kelly, as alleged by the plaintiff, agreed that if she would live with Cornelius Kelly and Jane Kelly, his wife, as their daughter, all the property owned by Cornelius Kelly should be the plaintiff's, and that she would be the only heir of Cornelius Kelly, and would receive all of his property at his death. Judgment was rendered in favor of the defendants, and the plaintiff appeals. The trial court made special findings of fact and conclusions of law as follows:

"1. The plaintiff is the daughter of Jeremiah C. Denny, who died about July 12, 1869, leaving the plaintiff and her three brothers orphans, their mother having died previously. Cornelius Kelly was a sergeant in the United States Army at Fort Leavenworth, Kansas, about that time and about the year 1873 said Cornelius Kelly and his then wife, Jane Kelly, being childless, took the plaintiff and her brother, Jerry Denny, to raise. Where the plaintiff and her said brother were before being taken into the family of said Cornelius Kelly is not shown in the evidence, but in the argument of the case it was conceded that they were taken from a local orphan asylum. On what terms or conditions the plaintiff was taken into

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the family of Cornelius Kelly or whether there were any conditions whatever is not shown in the evidence. However, Cornelius Kelly and his wife took the plaintiff into their home, reared her, sent her to the parochial school at Fort Leavenworth, Kansas, and later on, after they moved to the city of Leavenworth in 1889, sent her to St. Mary's Academy, where she graduated in the year 1892.

"2. Cornelius Kelly and his wife, Jane Kelly, were kind to the plaintiff and referred to her as 'Katie' and 'our Katie' and sometimes as 'Katie Kelly'; but she was also known by the earlier residents of Fort Leavenworth as 'Katie Denny' and was sometimes called 'Katie Kelly' and sometimes called 'Katie Denny' and her brother was called and known as 'Jerry Denny.' The plaintiff also referred to and called Cornelius Kelly and his wife 'father' and 'mother,' and they treated her with considerable kindness and affection, which in her younger years was reciprocated by her.

"3. After retiring from the army, Cornelius Kelly and his wife moved to the city of Leavenworth, Kansas, the exact date not being clearly shown. The plaintiff came to Leavenworth with Mr. and Mrs. Kelly and lived with them and continued to be treated as a member of the family until about 1889, when Cornelius Kelly sent the plaintiff to St. Mary's Academy for further education. Upon her entrance into the academy she was registered as 'Katie C. Denny.' She graduated from the academy in 1892. During her attendance at the academy she made frequent visits to the home of Mr. and Mrs. Kelly and continued to treat and regard it as her home and Cornelius Kelly received and signed the reports made by the teachers on printed forms for that purpose and under the line on which his signature was to be written were the printed words 'parent or guardian.' He signed these reports but he did not write the words 'parent or guardian' or either of them, but only signed his name 'Cornelius Kelly' on the report sent him by the teachers at the academy.

"4. After her graduation she returned to the home of Mr. and Mrs. Kelly, in Leavenworth, Kansas, and remained there for several months, living with Mr. and Mrs. Kelly as a member of their family, until about 1893. Up to this time friendly and affectionate relations existed between the plaintiff and Mr. and Mrs. Kelly. She had not been required at any time to do any hard or laborious work and both Mr. and Mrs. Kelly had stated at different times that they expected to leave their property to her; that they had no one else to leave it to; that she would get all their property when they were gone—meaning when they were dead.

"5. About 1893 the plaintiff obtained employment as secretary of All Saint's Hospital, at Kansas City, Missouri, receiving good wages, where she remained for perhaps two or three years, during which time she often visited Mr. and Mrs. Kelly. She then took a course in a business school, learned stenography, and obtained employment in the office of a law firm in Kansas City, Kansas, where she remained until about 1898, when she was married to William McKeown. During her employment in this law firm in Kansas City, Kansas, she often visited Mr. and Mrs. Kelly

and their relations were friendly and affectionate. There was no objection on the part of Mr. Kelly or Mrs. Kelly to the marriage of the plaintiff to William McKeown, and after her marriage, the plaintiff and her husband visited at the home of Mr. and Mrs. Kelly, and they expressed and showed a continued friendship and affection for plaintiff and a kindly regard for her husband.

"6. After her marriage, the plaintiff removed with her husband, to Colorado, where she has since resided. In the year 1907, Mrs. Jane Kelly was taken sick. The plaintiff came from her home in Colorado and stayed with Mrs. Kelly about a week, when Mrs. Kelly seemed much better and the plaintiff returned to her home in Colorado. In a short time thereafter Mrs. Jane Kelly became worse and shortly died. Plaintiff returned to Leavenworth and attended her funeral and remained a few days at the Kelly home.

"At or about the time of the funeral of Mrs. Jane Kelly, some unpleasantness occurred between Cornelius Kelly and the plaintiff because of the plaintiff's interference with the funeral arrangements and this incident seems to have caused Cornelius Kelly some embarrassment with his friends and occasioned some resentment on his part towards the plaintiff.

"7. After the funeral of Mrs. Jane Kelly in June, 1907, and before her return to her home in Colorado, Cornelius Kelly gave plaintiff some money and jewelry amounting to the sum of about one thousand dollars and stated to some of his friends that he was done with her. Plaintiff returned to her home in Colorado and continued to write to Cornelius Kelly and he answered some of her letters.

"In one of his letters, dated August 9, 1907, he said, among other things, 'Made my will, did not forget you.' In another letter, dated December 12, 1910, he said, among other things, 'I deeded my property to orphan asylum and willed my other assets to you—have nothing now but my pension; it meets my wants.'

"8. Cornelius Kelly continued to reside in his home on North Eighth Street, in the City of Leavenworth, Kansas, and on the 15th day of November, 1911, he was united in marriage to Margaret Sullivan, one of the defendants in this action. On November 20, 1911, he wrote plaintiff advising her of his marriage and after that time there seems to have been little communication between him and the plaintiff.

"9. On April 27, 1915, Cornelius Kelly made and executed his last will and testament, which has been duly admitted to probate, and in which will and testament the plaintiff was willed one hundred dollars. Various other bequests were contained in said will, some for charitable and religious purposes, and the remainder of his estate was willed to his second wife, Margaret Kelly, one of the defendants in this action.

"At and before the making of his will Cornelius Kelly stated that he had never adopted the plaintiff, that he had raised and educated her and that he was under no obligations to her whatever, and that he did not wish to leave her anything in his will, but his wife, Margaret Kelly, one

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of the defendants in this action, insisted that he leave her something and he therefore willed her the one hundred dollars above stated.

"10. The evidence does not prove that Cornelius Kelly or his wife, Jane Kelly, ever entered into any agreement of any kind with the plaintiff or with any other person or persons, by which there was ever any understanding or agreement of any kind or nature, that the plaintiff, under any circumstances, conditions or consideration, was to have or receive any of their property at the time of their death, or the death of either of them, and therefore the allegations in the plaintiff's petition in that regard have not been proven."

## CONCLUSION OF LAW.

"1. The prayer of the plaintiff's petition should be denied and judgment entered in favor of the defendants for costs."

1. The plaintiff presents five specifications of error; three of which are as follows:

"First. The trial court erred in not awarding plaintiff judgment for specific performance as prayed for in her amended petition.

"Third. The trial court erred in refusing to sustain plaintiff's motion to vacate and set aside the 10th finding of fact and the conclusion of law, made by the court, and to substitute therefor a different finding and conclusion, as set forth in her motion so to do.

"Fourth. The trial court erred in refusing to sustain plaintiff's motion for judgment in her behalf on the grounds set forth in her motion therefor."

The plaintiff states that "these three specifications all have to do with the 10th so-called finding and the sole conclusion of law made by the trial court," and argues that,

"The trial court evidently based its so-called 10th finding and its sole conclusion of law on the erroneous theory that plaintiff had to prove a *specific, express contract* between herself and Cornelius Kelly by direct evidence."

The plaintiff also says:

"The case is brought before this honorable court because it is evident from this 10th finding and its conclusion of law that the trial court either entirely misconceived or wholly disregarded the law of this state in cases of this character, as laid down by a long line of decisions of this court entirely in harmony with each other."

To support her contention, the plaintiff cites a number of cases decided by this court. In each of these cases a contract was clearly and definitely established.

Under her petition, it was necessary for the plaintiff to prove a contract between herself and Cornelius Kelly; but it was not necessary to prove that contract by direct evidence.

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Circumstantial evidence would have been sufficient, but the contract should have been clearly and definitely established. (*Anderson v. Anderson*, 75 Kan. 117, 127, 88 Pac. 743.) The evidence, as abstracted, has been carefully examined, and no evidence is disclosed by which to establish that a contract was ever made. The tenth finding of fact was correct.

2. Another specification of error is that the trial court erred in refusing to sustain the plaintiff's motion to modify certain findings of fact. These were numbered 1 to 9, inclusive. The plaintiff says:

"A very large portion of *nine* of the *ten* findings made by the trial court was favorable to plaintiff, therefore she could not ask that the *nine* be vacated. She could only ask that they be modified so as to conform and adhere to the material evidence and testimony and that such portions of them as were not material or were not supported by material testimony, be left out of them."

It was the duty of the trial court to find the facts from the evidence introduced. The court made complete findings, and those findings were supported by the evidence. No sufficient reason is advanced by the plaintiff for striking out any portion of any finding, nor for adding anything thereto. An examination of the evidence does not disclose any such reason. The plaintiff's motion was properly denied.

The judgment is affirmed.

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No. 21,447.

R. J. SMITH, *Appellee*, v. ELIJAH B. FENNER, *Appellant*.

SYLLABUS BY THE COURT.

1. **REWARD**—*Contract for Apprehending Criminal.* Evidence examined, and held sufficient to prove a contract to pay a reward for discovering, locating and apprehending a criminal.
2. **SAME**—*Right of Public Officer to Claim Reward.* The right of a public officer to claim a reward for doing his duty discussed.
3. **SAME**—*Nonpay Deputy Sheriff May Earn Reward.* A nonpay deputy sheriff who was under no official duty to discover and apprehend a thief is not barred by any rule of public policy from claiming a reward offered for the capture of the thief.
4. **SAME**—*Trial—Findings of Jury.* Findings of a jury examined, and no material inconsistency disclosed therein.

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5. *SAME—Evidence.* Evidence examined, and held sufficient to support the finding, verdict and judgment that plaintiff had earned the reward offered by defendant.

Appeal from Leavenworth district court; JAMES H. WENDORFF, judge. Opinion filed April 6, 1918. Affirmed.

*Arthur M. Jackson*, of Leavenworth, for the appellant.

*John T. O'Keefe*, and *Dennis Jones*, both of Leavenworth, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: The plaintiff, R. J. Smith, obtained a judgment against the defendant, Elijah B. Fenner, for the amount of a reward offered by the latter—

"For work done and performed for him (Elijah B. Fenner) at his request and with his knowledge and consent, in the matter of arresting the thief or thieves charged with picking the pockets and taking from the person of Elijah B. Fenner, and stealing therefrom a large sum of money."

The bill of particulars in part recited:

"And plaintiff avers that on or about the third day of July, A. D. 1916, in the City and County of Leavenworth, State of Kansas, Elijah B. Fenner, the defendant herein, said to this plaintiff, R. J. Smith, 'that some one stole from him nine hundred dollars (\$900.00) out of his pocket while he was at the baseball game yesterday' and promised and agreed with plaintiff that 'if he would get the fellow or fellows who got his money he would pay to him the sum of \$150.00'; that the words he used were about as follows: 'If you get the fellow who got my money I will give you \$150.00.' That plaintiff accepted the promise and agreement of defendant and went to work immediately to get the fellow or fellows, which he did. And plaintiff avers that he arrested the following named persons, Calvin Young, John Jacobson and Jessie Young, in Leavenworth County, Kansas, and that two of the said parties, Calvin Young and John Jacobson, have already been found guilty of stealing the defendant's money."

Certain special questions were answered by the jury:

"3. Who served the state warrant on Calvin Young at the Soldiers' Home? Answer: Rube Smith.

"4. Was Calvin Young the only person who was ever arrested for and convicted of picking the pockets of the defendant? Answer: Yes.

"5. What, if anything, did the plaintiff do for the defendant, in connection with the arrest of the thief or thieves who had picked the pockets of the defendant, that entitles said plaintiff to a reward of \$150.00 in

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this case? Answer: He assisted in locating and making the arrest of Calvin Young."

After the verdict was rendered, various motions were filed by defendant, including one for judgment for defendant for the reason—

"That the plaintiff admitted in his testimony that he was and is a regularly appointed deputy sheriff of Leavenworth County, Kansas, and that the arrest of one Calvin Young was made in Leavenworth County, Kansas."

Defendant's motion being overruled, and judgment being entered against him, he appeals, and urges several errors which will be noted.

It is first contended that the demurrer to plaintiff's evidence should have been sustained; and to justify this it is urged that plaintiff did not prove a contract with defendant. The court discerns no failure of evidence on that point. The evidence of various witnesses was to the effect that defendant said: "If you get the fellow that got the money, I will give you \$150." It was with defendant's knowledge, assistance and coöperation that plaintiff immediately went to work to discover and locate the thief and to have him taken into custody. These facts established the contract.

The important question presented by defendant arises from the fact that plaintiff was a deputy sheriff of Leavenworth county, defendant contending that public policy forbids a public officer to demand or receive a reward in addition to his official compensation for doing his duty. This rule is a familiar and salutary one, and it was particularly well stated in *Matter of Russell's Application*, 51 Conn. 577, 579:

"And it is now well settled that a public officer whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees, in the form of a reward or in any other form, for services rendered in the line or scope of his official duties. [Cases cited.]"

The rule and its qualifications are cited and discussed in *Marsh v. Express Co.*, 88 Kan. 538, 541, where it was said:

"It is contrary to public policy to allow an officer to recover a reward for the performance of an official duty. (*Matter of Russell's Application*, 51 Conn. 577; *Bank v. Edmund*, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A., n. s., 1170, 10 A. & E. Ann. Cas. 726; *United States v. Matthews*, 173 U. S. 381; 34 Cyc. 1753.)

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"On the other hand, no rule of public policy forbids such recovery where the officer is under no obligation arising from his official character to perform the service. (*Smith v. Vernon County*, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59; *Russell et als. v. Stewart et al.*, 44 Vt. 170; 34 Cyc. 1755; 24 A. & E. Encycl. of L. 953.)"

(See, also, *Hartley v. Granville*, 216 Mass. 38.)

In another Kansas case, which was here three times, the reward was not withheld because the claimants, both public officers, could not lawfully accept or collect it, but only because the party offering the reward did not know to whom it should be paid. (*Elkins v. Wyandotte County*, 86 Kan. 305, 120 Pac. 542; *Id.* 91 Kan. 518, 138 Pac. 578; *Id.* 92 Kan. 299, 140 Pac. 896.)

The case before us comes to this: Was it the official duty of plaintiff to discover, locate, and apprehend the thief. The evidence shows that the plaintiff was a nonpay deputy sheriff of the county where the crime was committed and where the criminal was apprehended. What are the duties of a nonpay deputy sheriff? So far as they are expressly defined by the statute, his duties are "to keep and preserve the peace, . . . and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections." (Gen. Stat. 1915, § 2750.) Any other official duty of a nonpay deputy sheriff could only relate to such as he is commanded to perform by a warrant or order of court, or by direction of his superior officer, the sheriff of the county.

When plaintiff's contract of employment was made with defendant he was under no official duty to discover and apprehend the thief. He had not been detailed for any such duty by the sheriff, nor charged with such duty by a warrant or order of court. The task did not fall into the category of duties imposed on all deputy sheriffs by the statute. Plaintiff could not have been punished or ousted from office for official dereliction if he had wholly ignored this crime and had refrained from doing anything towards the capture of the criminal. And so, when he was engaged by the defendant "to get the man who got his money," plaintiff was at that time as free as any private citizen to undertake to earn the reward.

Moreover, the rule which bars a public official from claiming a reward for doing his duty proceeds in part, at least, upon



the theory that his official compensation is his lawful reward for his services. (*Matter of Russell's Application*, supra.) As the plaintiff is a nonpay deputy sheriff, one of the reasons for the rule wholly fails when applied to him. Yet it may be conceded that if the reward were claimed by plaintiff for preserving the peace or quieting an affray—these duties being imposed upon him by law—or for executing a warrant or performing a specific duty imposed on him by the sheriff, he probably could not collect the reward although he was serving without pay.

Did the plaintiff earn the reward? The reward was sufficiently earned, as shown by the jury's fifth finding and the evidence which supported that finding. It is immaterial whether plaintiff had any part in the mere formality of making the arrest. When plaintiff, pursuant to defendant's offer, accompanied defendant to the place where the thief was expected to be found, and assisted in locating the thief and caused or coöperated in causing him to be detained until a warrant could be procured for his formal arrest, and the thief was effectually brought to justice through plaintiff's assistance and coöperation, and no other person claims the reward or a share of it—there being no intimation that any other thief not brought to justice took part in the robbery—it seems that plaintiff is justly entitled to the reward.

The third finding of the jury is to the effect that plaintiff made the arrest of the thief, while the return on the warrant showed that the arrest was made by the sheriff himself. That is not important. The controlling fact turns on the question as to whose efforts led to the discovery and apprehension of the thief. The evidence justifies the jury's special finding that it was effected through the efforts of the plaintiff, and justifies the general verdict and judgment in his behalf. (*Stone v. Dysert*, 20 Kan. 123; *Elkins v. Wyandotte Co.*, 86 Kan. 305, syl. ¶ 2, 120 Pac. 542. See, also, Note, 8 Ann. Cas. 860.)

Affirmed.

No. 21,448.

ROYAL D. CALKINS, *Appellee*, v. THE SALINA NORTHERN RAILROAD COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. CONDEMNATION PROCEEDINGS — *Damages — Findings Not Conflicting*. In a condemnation proceeding a special finding of a jury that there was no evidence of the depreciation of each part of a farm lying on either side of the right of way, does not conflict with another finding of the damage to the land as a whole, nor indicate that the finding as to damages awarded for the land not taken for right of way was not supported by the evidence.
2. SAME—*Interest on Damages*. A proceeding to condemn private property for public use does not involve a tort, and an owner whose land is so appropriated is entitled to interest on the damages sustained by him between the time of the appropriation and the time of the rendition of judgment.

Appeal from Saline district court; DALLAS GROVER, judge. Opinion filed April 6, 1918. Affirmed.

*David Ritchie*, of Salina, for the appellant.

*C. W. Burch*, *B. I. Litowich*, and *La Rue Royce*, all of Salina, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: The action in the district court was an appeal from an award in a condemnation proceeding. Defendant appeals from the judgment in favor of plaintiff.

The plaintiff's farm, through which defendant built its road, is comprised of the south half of a quarter section. The right of way runs lengthwise through the farm in a general southeasterly direction, dividing it about in halves, each triangular in shape. Plaintiff's house stands in the south portion, near the south line of his farm. Nearly the whole length of the right of way is in a cut, the greatest depth of which is not more than five feet, and on each side of the track is a ditch. About half way across the farm a crossing was built to enable plaintiff to go from one part of the farm to the other, cattle guards and gates to be built later at this point. The right of

way took 6.39 acres. The report of the commissioners, filed April 21, 1915, allowed the sum of \$579.25 as the value of the land taken and the damage to that not taken, and this amount was deposited by the defendant with the county treasurer on July 21, 1915, about which time the defendant took active possession of the land. At the trial the jury made the following among other special findings:

"2. Q. Without reference to the value of the land actually taken for right of way what was the amount of damages, if any, to the remainder of the farm by reason of the taking of said 6.39 acres for the right of way? A. \$1361.00.

"3. Q. How much was the damage to that part of the farm lying north of the right of way, if any? A. No evidence.

"4. Q. How much was the damage to that part of the farm lying south of the right of way, if any? A. No evidence."

In this appeal no question is raised as to the award made for land taken for right of way, but it is contended that the special findings of the jury relating to the depreciation of that not taken are fatally inconsistent with each other. It is said that findings numbers 3 and 4 conflict with finding number 2, and in effect negative it. After finding that the damages to the land not taken were \$1,361, the jury, in answer to questions 3 and 4, found that there was no evidence as to the depreciation of the respective parts into which the farm was divided by the railroad. The finding that there was no evidence of the damages sustained as to a particular fraction of the farm does not imply that there was no evidence as to the depreciation of the farm as a whole. There was evidence of the damages to the entire farm resulting from the condemnation, and sufficient to sustain finding number 2, but it appears that no evidence was produced, nor did the parties deem it material, to show the exact quantity of the plaintiff's land which lay on each side of the right of way, nor the exact depreciation of each tract by reason of the condemnation, any more than they sought to ascertain the depreciation of the five acres on which the buildings were situated or of any other fraction of the farm. It was not necessary, and, as the case was tried, the jury had no basis for finding the loss on each part. There was no real conflict or inconsistency in the findings, nor can it be said that finding number 2 is without support.

The defendant objects to the allowance of interest on the

award prior to the verdict. It appears that interest was allowed on the compensation between the condemnation and the rendition of the verdict, less the amount defendant had deposited with the county treasurer. It is insisted that as interest is not allowed for torts like the destruction of property by fire (*A. T. & S. F. Rld. Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722; *U. P. Rld. Co. v. Holmes*, 68 Kan. 810, 74 Pac. 606), none should be allowed for damages resulting from the taking of property for a right of way. The condemnation of land for a public purpose cannot be regarded as a tort. (15 Cyc. 557.) An appropriation of land for this purpose is a proper exercise of governmental power, and all property is held subject to that right. The award is compensation for property taken, not wrongfully but in a manner authorized by law, and the amount of the compensation can be readily ascertained by recognized standards of valuation. That interest may be recovered on an award from the time of condemnation to the time of the judgment is not an open question in this state. In *Gulf Railroad Co. v. Owen*, 8 Kan. 409, it was held that a landowner was entitled to interest on an award from the time of the appropriation, regardless of the fact that the railway company had deposited the amount assessed by the commissioners with the treasurer. In *Cohen v. St. L., Ft. S. & W. Rld. Co.*, 34 Kan. 158, 8 Pac. 138, it was decided that where a railroad company has taken and held possession of land for a right of way, interest should be allowed on the amount of the award from the time possession was taken until the time of trial. (See, also, *W. & W. Rld. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75; *Irrigation Co. v. McLain*, 69 Kan. 334, 76 Pac. 853; *Smith v. Railway Co.*, 90 Kan. 757, 136 Pac. 253.)

No error being found in the record, the judgment is affirmed.

No. 21,449.

JOHN CRAIG, *Appellee*, v. THE SALINA NORTHERN RAILROAD COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. CONDEMNATION PROCEEDINGS—*Railroad Right of Way—Measure of Damages to Farm as a Whole—Evidence.* In the trial of an appeal from an award of damages for the appropriation of a railroad right of way through a farm, a witness for the landowner testified that he could give an opinion as to the value of the farm as a whole, but not of the separate tracts of which it was composed. *Held*, that no reversible error was committed in sustaining objections to questions asked him on cross-examination as to the value of specific tracts, and as to how he could tell what the whole was worth without knowing the value of the different parts.
2. SAME—*Instructions.* The instructions in such a case held not to be objectionable as failing to state the issues.
3. SAME—*Findings as to Damages to Each Separate Tract Not Required.* In such a case no error is committed in the refusal to require the jury to answer questions as to how much depreciation in the value of each of several tracts forming a part of the farm was caused by the appropriation of the right of way.
4. SAME—*No Error in Refusing Special Question.* In such a case no error is committed in the refusal to require the jury to enumerate the considerations that tended to make the farm less valuable by reason of the location of the railroad.
5. SAME—*Verdict—No Passion or Prejudice Shown.* The record held not to show that the verdict was the result of passion or prejudice.
6. SAME—*Interest on Damages Properly Computed.* On an appeal from an award in condemnation proceedings the allowance of interest from a date subsequent to the appropriation is held not to have been erroneous.

Appeal from Saline district court; DALLAS GROVER, judge. Opinion filed April 6, 1918. Affirmed.

David Ritchie, of Salina, for the appellant.

C. W. Burch, B. I. Litowich, and La Rue Royce, all of Salina, for the appellee.

The opinion of the court was delivered by

MASON, J.: The Salina Northern Railroad Company acquired a right of way across the farm of John Craig by condemnation. He appealed from the award of the commissioners,

and on a trial in the district court was allowed a larger sum. The company now appeals.

1. A witness for the plaintiff testified that he could estimate the value of the plaintiff's farm before and after the condemnation, and he undertook to do so. On cross-examination he was asked if he could give the value of one of the tracts of which it was composed. He answered, "I don't know as I can in the separate tracts. I was n't figuring on the farm that way." He was then asked if he had any opinion as to the value of each of a number of tracts in turn. Objections to these questions as involving repetition were sustained; and complaint is made of these rulings. We see no error in this regard. The witness had, in substance, disclaimed ability to place a separate valuation on the several tracts. The rights of the defendant were not invaded by the refusal to permit the matter to be gone over with respect to each of them. The witness was also asked on cross-examination how he could form a judgment of the value of the whole farm if he could n't tell what the different parts were worth, and an objection to this question as being argumentative and repetition was sustained. Doubtless it would not have been improper for the court to have allowed the question to be answered on the theory that something might be developed which would aid the jury in determining the weight to be attached to the opinion of the witness, but we regard its exclusion as within the reasonable discretion of the court in supervising the examination. The defendant had the opportunity of arguing to the jury that if the witness could not put a valuation on the tracts separately his valuation of the whole was the less likely to be correct, and what if anything the witness might have been able to say in reply to that suggestion was not highly important.

2. The contention is made that the court erred in failing to instruct the jury as to the elements to be considered in arriving at the amount to be awarded. No special instructions were asked, and no specific omission is pointed out in the brief. The jury were told that they could not consider benefits to the land, nor damages from risk of fire, or of injury to stock, or of teams being frightened, or of depredations by tramps. The amounts allowed for the land taken and for the injury to the

remainder were separately found. We perceive no vital omission in the charge.

3. Special questions were submitted, asking the jury how much damage they allowed to each of several tracts forming a part of the farm. To each of these questions the answer was returned, "No evidence on separate tracts taken as a whole farm." The defendant asked that the jury be required to return a more specific answer, but the request was refused. The contentions are made that the answer is untrue, because there was some evidence as to the value of the separate tracts before and after the condemnation, and that the defendant was entitled to have the questions definitely answered. The jury's answer that there was no evidence as to the value of the particular tract does not amount to a statement on their part that no evidence whatever was introduced on the subject. It is to be interpreted as meaning that there was no persuasive evidence—no preponderance of the evidence—such as to enable them to form a judgment in the matter. (*Jolliff v. Railway Co.*, 88 Kan. 758, 129 Pac. 1178.) We do not regard as erroneous the refusal to require other answers to be made. Several of the particular parcels inquired about were not touched by the right of way, and considered as separate and independent tracts could have suffered no depreciation. If the damages to the whole farm were to be arrived at by estimating the loss to each tract and adding together the amounts so obtained, there would be a purpose in requiring the award to be itemized, but such is not the case. The actual loss to the owner could only be arrived at by considering the farm as a whole, in view of the use to which it was put. After the amount had been so ascertained, it might possibly have been apportioned among the different parcels according to some principle of distribution, but no benefit could accrue from such a process, as the allowance was not made piecemeal, and could not have been reached in that manner.

"In estimating the damages to a farm occasioned by the condemnation of a portion of it for railroad purposes the various subdivisions of the farm, like wheat-field, corn-field, meadow, pasture, house-lot, garden-lot, barn-yard, etc., cannot be considered separately and damages assigned to each. An entire tract, when occupied, improved and used as a farm, cannot be valued in such detached parcels." (*Railway Co. v. Roe*, 77 Kan. 224, 226, 94 Pac. 259.)

A suggestion is made that one of the tracts in question is separated from the house by a highway and also by a creek. These considerations are not fatal to the right of the plaintiff to have the farm treated as a unit. (2 Lewis Eminent Domain, 3d ed., § 698.)

4. The jury were asked what elements of damages they considered in making up the award, aside from the value of the property taken, and answered: "Depreciation of value of the farm as a whole." Complaint is made on the ground that a fuller answer should have been exacted. It has been specifically held that the jury need not be required to show the amount of loss deemed due to each factor in the depreciation. (*L. T. & S. W. Rly. Co. v. Paul*, 28 Kan. 816.) We think no error was committed in refusing to compel the jury to enumerate all the considerations that tended to make the farm less valuable by reason of the location of the railroad. As has been said in a similar case:

"A party desiring special findings should submit particular questions instead of general ones, and should not leave the jury to analyze and separately state the constituent elements of the damage suffered. The jury may be interrogated as to any particular element about which there was testimony offered, but to require them to distinguish and describe all the sources of damage and the amount allowed for each, would probably result in confusion, delay, and uncertainty. Such a procedure is not within the purpose of the statute, and has already been disapproved of by this court." (*L. & W. Rly. Co. v. Hawk*, 39 Kan. 638, 640, 18 Pac. 943.)

5. It is urged that the amount awarded is so large as to show passion and prejudice. The verdict is not without some evidence in its support, and the approval of the trial court makes it conclusive.

6. The remaining question involved is whether error was committed in allowing interest on the difference between the amount deposited by the defendant and the amount here recovered, for the period between July 21, 1915, prior to which time the appropriation had taken place, and the return of the verdict. The defendant invokes the rule which forbids the allowance of interest as such in actions for unliquidated damages founded on tort. The present proceeding is not of that character, and the rule does not apply. (*Calkins v. Railroad Co.*, ante, p. 835.)



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Interest is allowable from the date of condemnation, unless it is shown that the owner's possession was not interfered with, and that he suffered no embarrassment or inconvenience therefrom. (*Irrigation Co. v. McLain*, 69 Kan. 334, 341, 76 Pac. 853.) No such showing was made; in fact, there was evidence that grading was begun in June, 1915. We conclude that the allowance of interest was proper.

The judgment is affirmed.

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No. 21,453.

J. O. ROBINSON, *Appellant*, v. J. L. SMALLEY and JESSIE SMALLEY, *Appellees*.

SYLLABUS BY THE COURT.

1. **CONTRACT**—*To Execute Oil and Gas Lease—Incorporeal Hereditament—Statute of Frauds.* A contract to execute an oil and gas lease granting the right to explore, and, if mineral be found, to produce and sever, is a contract for the sale of an incorporeal hereditament, within the meaning of the sixth section of the statute of frauds. (Gen. Stat. 1915, § 4889.)
2. **SAME**—*When Actionable Though Not in writing.* A contract by a husband, whereby for a consideration he agrees to procure his wife to sign an oil and gas lease of the character described, need not be in writing to be actionable.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Reversed.

*J. Graham Campbell*, and *Ray Campbell*, both of Wichita, for the appellant.

*J. E. Torrance*, and *O. W. Torrance*, both of Winfield, for the appellees.

The opinion of the court was delivered by

BURCH, J.: The action was one to recover damages for breach of contract. An objection to the introduction of evidence in support of the petition was sustained, judgment was rendered for the defendants, and the plaintiff appeals.

The defendants are husband and wife. They agreed orally to execute and deliver to the plaintiff an oil and gas lease cov-

ering part of their homestead. J. L. Smalley did execute the lease, but his wife declined to do so.

The plaintiff argues that the agreement to make the lease did not relate to an interest in land, but merely gave the right to explore, and, if oil and gas were found, to produce and sever them. It is conceded that the lease authorized an invasion of the homestead for the purpose of prospecting and for the prosecution of oil and gas operations, and would be void without joint consent of husband and wife, but it is insisted no contract for the sale of land, or any interest in land, was made, within the meaning of the statute of frauds, and consequently that an action lies on the oral promise to execute the lease. While the court has held that an oil and gas lease of the kind under consideration does not constitute a conveyance, will not support a mechanic's lien, does not operate as a grant and severance of mineral in place, and creates no estate proper in the land itself, it does create an incorporeal hereditament. A contract for the sale of hereditaments, whether incorporeal or corporeal, is within the sixth section of the statute of frauds. (Gen. Stat. 1915, § 4889.)

In the petition damages were claimed from J. L. Smalley on another ground. The lease lacked nothing but the wife's signature to make it effective, and it was alleged that J. L. Smalley, for a consideration, contracted to procure his wife's signature to the lease.

The statute of frauds applies to the contract between vendor and vendee. This was not a contract by which Smalley agreed to sell anything, or by which his wife agreed to sell anything, or by which the plaintiff agreed to sell anything. The contract was purely one of employment to produce a stated result, and consequently the statute of frauds has no application. The employment was somewhat analogous to employment of an agent to negotiate a purchase of land. In such a case the court said:

"The contract between the plaintiff and the defendant, constituting the defendant the agent of the plaintiff, was not 'a contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them,' but it was simply a contract making the defendant *an agent* to negotiate for the *purchase* of lands, tenements, and hereditaments, and interests in and concerning them." (*Ross v. Hayden*, 35 Kan. 106, 112, 10 Pac. 554.)

No question of public policy is involved. The wife was competent to bargain respecting her homestead rights; it was per-

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Stahl v. Stevenson.

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fectly lawful for her to do so, and it was perfectly lawful for her husband to deal with her, as agent of a prospective purchaser, respecting her homestead rights. Therefore, to the extent indicated, the petition stated a cause of action.

The judgment of the district court is reversed, and the cause is remanded for trial.

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No. 21,286.

GLADYS PRICE STAHL, *Appellee*, v. JAMES HENRY STEVENSON  
et al., *Appellants*.

OPINION DENYING A REHEARING.

SYLLABUS BY THE COURT.

1. ORAL PROMISE—*To Leave Property to Heir—Not Within Statute of Frauds.* The provision of the statute of frauds requiring written evidence of a contract "for the sale of lands . . . or any interest in or concerning them" (Gen. Stat. 1915, § 4889) does not apply to all contracts which in any way concern lands.
2. SAME—*Former Ruling Adhered to.* The former ruling, refusing to reverse the judgment on account of the admission of evidence, adhered to.
3. SAME—*To Leave Share of Property to Heir—Trust in Land Created by Implication of Law.* Where an ancestor, for a valuable consideration, orally promises that a descendant shall at his death receive the share of his estate indicated by the statute of descents and distributions, but dies leaving all his property to others by will, a court of equity may grant relief by impressing a trust upon the property in the hands of the beneficiaries of the will, which trust must be regarded as arising by implication of law, and therefore as not within the operation of the statute forbidding the creation of express trusts in real property otherwise than by writing.
4. SAME—*To Leave Property to Heir—Statute Relating to Wills Does Not Apply.* A contract by which the obligor undertakes to make provision at his death for the obligee, although no present title to any property passes, is not required in order to be valid to be executed in accordance with the statute relating to wills.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion denying a rehearing filed April 6, 1918. (For original opinion of affirmance see *ante*, p. 447.)

*Frank L. Martin, C. M. Williams, both of Hutchinson, L. S. Ferry, T. F. Doran, and M. F. Cosgrove, all of Topeka, for*

the appellants; *Van M. Martin*, and *John M. Martin*, both of Hutchinson, of counsel.

*A. C. Malloy*, and *F. Dumont Smith*, both of Hutchinson, for the appellee.

The opinion of the court was delivered by

MASON, J.: In this case (*ante*, p. 447) it was decided that an agreement by the plaintiff's grandfather, based upon a valuable consideration, that she should receive at his death the share of his estate which she would inherit should he die intestate, is not brought within the statute of frauds by the circumstance that he died owning real property. In a petition for a rehearing, various matters are urged which we regard as warranting further discussion.

1. Counsel for the petitioners contend that this court has erred in its construction of the provision of the statute of frauds which forbids the enforcement, without a writing signed by the party to be charged, of "any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them." (Gen. Stat. 1915, § 4889.) Their contention is that this should be interpreted as though it read:

"No action shall be brought whereby to charge a party . . . upon any contract for the sale of lands, tenements, or hereditaments, upon any contract for any interest in lands, tenements or hereditaments or upon any contract concerning lands, tenements or hereditaments."

We do not accept this view, although language is used in *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850, tending to support it. The statute does not apply to all contracts which in any way concern real estate. For instance, it does not apply to certain boundary agreements, although they concern lands. (*Steinhilber v. Holmes*, 68 Kan. 607, 75 Pac. 1019.) It does not apply to contracts employing an agent to buy or sell realty. (29 A. & E. Encycl. of L., 2d ed., 892.) The distinction is discussed in *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, and the rule announced in that case is applied in *Robinson v. Smalley*, *ante*, p. 842, decided by this court at the present session. However, this question is not controlling here. The word "sale" is doubtless broad enough to cover any agreement by which the passing of any interest in real estate is to be accomplished. A promise to devise a specific tract of land is within the stat-

ute. This case was decided upon the theory that the contract involved did not necessarily concern real estate—that at the time it was made it was possible that it might be fully carried out without the passing of title to any realty whatever. Our judgment was and is that that view is in accordance with reason and not out of harmony with the effect generally given to the statute of frauds, although expressions and decisions to the contrary may be found. In *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71, the enforcement of a contract to make a foster child an heir was denied upon the ground that it was within the statute, but the point that the acquisition of no specific property was involved was not touched upon in the briefs or opinion, the court merely following *Baldwin v. Squier*, 31 Kan. 283, 1 Pac. 591, where the agreement was to devise a specific tract of land.

2. In the original opinion one reason given for not reversing the judgment on account of the exclusion of certain evidence, was that it was not within the pleadings. It is now suggested that in ejectment any defense may be made under a general denial. The action was not ejectment. Comment is made upon the statement in the opinion that “the action is for the recovery of a third of the specific property.” This was not intended to mean that the action was a possessory one—for the recovery of the possession of specific property—and we do not regard it as fairly open to that interpretation. Moreover, even in ejectment, where a defendant elects to set out specifically the facts on which he relies, his pleading is governed by the same rules as in other actions. (*Wicks v. Smith*, 18 Kan. 508.) Another reason why a reversal should not be ordered by reason of the rejection of evidence of a claim by the defendants based upon a contract with the grandfather, is that the questions asked of the witness did not suggest any inquiry into that subject, and during the trial no offer of proof appears to have been made relating thereto. Time was taken to put in writing what was intended to be proved by the witness, but neither the abstract nor the transcript shows that any such statement was presented to the court until the motion for a new trial was heard. The rule requiring the presentation of excluded evidence at the hearing of that motion does not excuse the offer of proof at

the trial. (*Jones v. City of Kingman*, 101 Kan. 625, 168 Pac. 1099.) We should be reluctant to allow the final disposition of the case to turn upon any technical rule of practice, but we are impressed with the belief that the evidence in question was not vital. As mentioned in the original opinion, the court offered to permit the witness to testify if he would disclaim interest. But, while it was stated that he had no interest and claimed none, no disclaimer was made. This course does not indicate that the defendants themselves attached great importance to the testimony.

3. The defendants assert that, upon the theory adopted by the court, the plaintiff's remedy lay in an action for damages for breach of the contract. There is a well-recognized power in a court of equity to give relief in such cases. The equitable proceeding is sometimes spoken of as one for specific performance, but where verbal accuracy is aimed at it is described as one for relief analogous to specific performance, "by fastening a trust on the property in the hands of heirs" and others. (36 Cyc. 735, 736.) The defendants insist that, regarded in this light, the action must fail because the plaintiff is compelled to rely upon an express trust in real estate created without a writing, which is rendered void by the statute (Gen. Stat. 1915, § 11674), and a case is cited which seems to adopt that view. (*Dicken v. McKinley*, 163 Ill. 318.) It is our judgment, however, that the trust relied upon by the plaintiff arises by implication of law. No interest in the property then owned by the plaintiff's grandfather was created by their agreement, and no trust then arose with respect to any of that property. He might have given away or lost all the property he then had without a violation of his contract. But when he died leaving a will giving to others everything he owned at the time of his death, equity was empowered to impress a trust upon it for her benefit, as a means of giving her relief to which she is entitled in good conscience—a trust which we regard as resulting by implication of law from the conduct of the testator and the relation of the other claimants to the property.

"Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will; or by words

either expressly or impliedly evincing an intention to create a trust.

"Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties. Express and implied trusts therefore differ chiefly in that express trusts are created by the acts of the parties, while implied trusts are raised by operation of law, either to carry out a presumed intention of the parties or to satisfy the demands of justice or protect against fraud." (39 Cyc. 24, 25.)

4. A final contention of the appellants is that a contract of the plaintiff with her grandfather that she was to receive a third of the property he owned at his death would be testamentary in character and unenforceable because not executed in accordance with the statute in relation to wills. In support of this are cited *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, and other like cases, holding that an instrument undertaking to become effective as a conveyance of title at the death of the grantor is testamentary and not contractual, and therefore is revocable. We do not regard that principle as applicable here. If a will were formally executed devising property in accordance with a contract between the testator and the devisee, the will would be revocable as a will, but the contractual rights of the beneficiary would not thereby be abrogated. Here there was no attempt to vest title to specific property in the plaintiff at the time of her grandfather's death, but an undertaking on his part so to adjust his affairs that she should receive a third of his estate. The title which it was contemplated the plaintiff should receive was not to be created directly by the contract, but by her grandfather's will, or by the statute of descents and distributions in case of his intestacy. The contract in this aspect does not appear to be substantially different from others by which the obligator undertakes that provision shall be made at his death for the obligee. Such agreements are not required to be executed as wills. (*Winne v. Winne*, 166 N. Y. 263; *In re McIntosh's Estate*, [Iowa] 159 N. W. 223; *White v. Winchester*, 124 Md. 518.)

The petition for a rehearing is denied.

No. 21,454.

THE J. I. CASE PLOW WORKS, *Appellant*, v. H. O. THORNE, *Appellee*.

## SYLLABUS BY THE COURT.

**SALE OF PLOW—*Proposition by Correspondence—No Acceptance—No Contract—Authority of Plaintiff's Salesman.*** After appointing defendant its local dealer to sell its plows, plaintiff wrote him proposing to ship him a certain plow it had previously sold in his territory through its traveling salesman and to charge him the wholesale price, with directions that upon delivering the plow he should make settlement in his favor with the purchaser and take the latter's notes, which would leave him a small profit. The letter concluded with the statement, "and unless we hear from you to the contrary, will proceed as above." The defendant made no reply to the letter, and plaintiff shipped him the plow and charged his account with the price. Before the plow was delivered, defendant notified the traveling salesman that he would have nothing to do with the transaction, but agreed at the request of the salesman to receipt for the plow and turn it over to the purchaser, which he did. In an action against the dealer to recover the purchaser price, *held*, that the evidence was sufficient to sustain a finding of apparent authority in the traveling salesman to make the arrangement carried out, and that the contract sued upon never became effective, because there was no acceptance of the proposition for the purpose stated in the letter.

Appeal from Kingman district court; GEORGE L. HAY, judge. Opinion filed April 6, 1918. Affirmed.

S. S. Alexander, of Kingman, for the appellant; Edgar C. Ellis, Hale H. Cook, Roy K. Dietrich, and Raymond G. Barnett, all of Kansas City, Mo., of counsel.

John H. Connaughton, and H. E. Walter, both of Kingman, for the appellee.

The opinion of the court was delivered by

PORTER, J.: On June 10, 1915, Ira L. Haynes, a traveling salesman of the J. I. Case Plow Works, sold an engine plow to P. P. Jones, a farmer of Kingman county; the order for the plow being on a written form which provided that the contract should not be binding until it was accepted by the plain-



## Plow Works v. Thorne.

tiff. About the same time the traveling salesman made an arrangement with the defendant, H. O. Thorne, who was engaged in the hardware and implement business at Norwich, by which Thorne became the local dealer for the plaintiff.

On June 25, the plaintiff wrote the following letter to Thorne:

"We attach letter which we are writing to Mr. P. P. Jones of Belmont, Kansas.

"Mr. Haynes has just advised us that he wishes you to make the profit on this deal, so we want you to understand it thoroughly. In shipping this plow we will bill it to you at \$460.00 with extra shares, terms, Nov. 1st, or 7½% for cash September 1st. Upon delivering the plow you can make settlement in your favor with Mr. Jones, and since his notes are to draw 8% interest from September 1st, you will see the deal will carry itself. Now, as a matter of fact, the margin in this deal is small, only \$34.50, but if Mr. Jones' paper is good, feel sure you will be satisfied with the deal, and unless we hear from you to the contrary, will proceed as above."

On the same day plaintiff wrote to Jones as follows:

"Mr. Haynes has just forwarded us your letter of the 23rd, in which you ask that we reinstate your order, and we beg to advise that we are doing so.

"Our understanding of the order is that you want our Lever Left Engine Gang Plow, equipped with 8, 14" Bottoms with extra shares, price, f. o. b. Kansas City, to be \$460.00. Terms, ½ December 1st, 1915, ½ December 1st, 1916, with 8% interest from September 1st, 1915. We will proceed with the order and make shipment July 1st, or prior to that date if possible. For your convenience we will arrange to ship this through our agent Mr. H. O. Thorne of Norwich, Kansas, who will be glad to handle the delivery and settlement for you."

Receiving no reply from the defendant, the plaintiff shipped to him the plow it had sold to Jones. When the plow arrived at Norwich, Jones came in to receive it, and the defendant advanced the freight, receipted for the plow, and turned it over to Jones, who reimbursed him for the freight. In the fall of 1915, Jones wrote plaintiff that he would not be able to pay more than \$100 on the purchase price and would require time for the balance. The plaintiff thereupon brought this action against Thorne, the local dealer, to recover the purchase price, on the theory that by his failure to reply to their letter of June 25 and his having receipted to the railway company for the plow when it arrived at Norwich, he became liable upon the terms stated in the letter.

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In addition to the general denial in the answer the defendant alleged that the plow was sold to Jones upon a written order given to the authorized agent of the plaintiff and accepted by plaintiff; that he had nothing to do with the sale of the plow and did not receive it, but that it was received by Jones and the freight paid by Jones; that defendant had notified the agent of the plaintiff that he would have nothing to do with the transaction, would not accept the plow, nor be held responsible for the price; that thereupon the agent of the plaintiff agreed that the plaintiff would look to Jones for payment, and afterwards went to Jones and made a settlement with him in regard to the payment. The verified reply denied that Haynes was authorized to make any change in the terms of the proposed contract.

At the trial the station agent at Norwich produced the freight records showing that the freight charges had been paid by check signed in Thorne's name, and testified that the plow was delivered to Thorne, but the witness was unable to find the receipt. On cross-examination he stated that Sipes, a clerk in the employ of Thorne, usually transacted the business with the railway and wrote the check and signed the original freight bill; that Jones unloaded the freight; and that in a conversation Thorne told him the plow was for Jones. The defendant testified that Jones reimbursed him for the freight; that at the time he accepted the appointment as local dealer, Haynes wanted him to take over the deal with Jones for the plow he had sold, but he refused at that time to have anything to do with the transaction because the plow had been sold at wholesale price, and there was not enough in it to pay him to bother with it. He testified that after receiving the letter of June 25, and before the plow arrived, Haynes was there, and he told Haynes he would have nothing to do with the plow because the sale had been made before he took the agency; that Haynes said, "they probably would ship the plow to me anyway, being I was the agent there"; that he again told him he would have nothing to do with it; and that Haynes then asked him to see that Jones received the plow; that sometime after the plow had been delivered to Jones, Haynes was in Norwich again, and said he had been out to see Jones for the purpose of settling; that Jones had been too busy with harvesting to try

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out the plow, but he intended to see him again and settle. The testimony of the defendant is somewhat confusing respecting the dates of the several conversations he claims to have had with the traveling salesman, but he testified that there were several conversations, and that the one in which he was authorized to turn the plow over to Jones was after the letter had been received and before the plow was delivered.

Mr. Sipes, defendant's clerk, testified that he was present at a conversation after the letter of June 25 and before the plow was received, in which Haynes told the defendant that this plow would more than likely be shipped to him on account of his taking the agency, and for him to see that Mr. Jones got it anyway, even if he did not take over the deal. He further testified that he was present when Haynes came to make a settlement with Mr. Jones, and heard his statement why the settlement had not been effected and that he would try again in the near future. So there was testimony which justified the jury in finding that the defendant notified the company through its traveling salesman that he would not be bound by the terms of the company's letter, and that in receipting for the plow and turning it over to Jones he was carrying out the instructions of the traveling salesman who had sold the plow to Jones.

The testimony of the principal witness of the plaintiff, who was the manager of the Kansas City, Oklahoma City and Denver branch offices, respecting the duties and authority of the traveling salesman Haynes, is very unsatisfactory and seems to be lacking in frankness; or perhaps the witness did not know what authority the agent possessed. He testified that Haynes was employed as a special salesman only, and not to look after collections; had never made any collections, and was not authorized to do so. Asked if he had authority to make such contracts as the one in question, he testified that he had authority to write orders and submit them to the company; that to the knowledge of the witness he was never sent out to make settlements and collections at any time. Asked if he had made the contract with defendant Thorne, he replied:

"A. I will say that Mr. Haynes was not employed to make contracts with our regular dealers.

"Q. Well, he did make a contract with Mr. Thorne, did n't he, as a regular dealer? A. Mr. Thorne was not a dealer of ours at the time.

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Mr. Haynes made the contract. . . . No, he was out to call on dealers—new dealers—dealers we did n't have. Prospective dealers, I will say. That was his duty. That was the reason he was not a territory man. He was to call on anyone; get new trade for us and he was to have a commission.

“Q. His duty was to make sales? A. Yes, sir.

“Q. General authority along that line? A. Well, I don't know what you mean by general authority. He was out to sell goods and submit his orders.

“Q. By the Court. He was out to sell goods for your company. He was authorized to sell goods? A. He had the prices and terms and order blanks and of course he was to keep on selecting dealers for us and help them make sales possibly with consumers and then submit to us.

“Q. Was the authority in writing from your company? A. No, I can't say it was.

“Q. Who employed him? A. I employed him. . . . He was only to do special work for us for a short time. He was not a regular representative. We have regular representatives stationed here and there but he represented to us that he could get a certain class of business that we were not getting, and I employed him as a special man on a commission basis to get out and get that and he was to submit his order and if passed we would place them in.

“Q. If he should procure an order from an individual how was the deal closed? A. You mean consumer or dealer?

“Q. Farmer. A. We would call that cancelled. We always operate that through the dealer. In selling an article to a consumer then he need or need not submit us that order. We should submit it to the dealer, I should say.”

Continuing his direct examination, he was asked if he had authority to make deals with consumers, such as Mr. Jones. He replied:

“A. No, we did not employ him to call on consumers. Our business relations are entirely with dealers. With the dealer, I will say, and any time any of our salesmen wish to assist in helping our dealers to sell to a consumer, we are glad to do that.

“Q. He had authority, did he, to assist your dealer in making a sale to a consumer? A. That much. We are glad to line in a consumer and assist if we can.

“Q. He had that authority? A. I don't know as I authorized him.

“Q. Don't you, as a matter of fact, employ him to do that and accept the benefit of his services in so doing? A. It is the custom with us.

“Q. Thorne was not a dealer at the time you took this contract from

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Jones? . . . A. Yes, sir, he had made a contract with Mr. Haynes two days prior to the time that Mr. Haynes sold the plow to Mr. Jones.

"Q. Mr. Haynes still had authority to sell to Mr. Jones even though Mr. Thorne was not an agent? A. Mr. Haynes did n't have authority to sell to anyone. He had authority to submit his orders.

"Q. Mr. Haynes had full authority to do what he did do there with reference to the Jones matter? A. Well, I would n't say that we authorized him to do that but at the same time there was no objection to his going out and selling Mr. Jones that plow."

Since there was evidence to sustain defendant's contention that before the plow was received, and before he accepted the written proposition, he was directed by the traveling salesman to receipt for it and see that Jones got it, the only remaining question is whether there was evidence to warrant the jury in finding that the traveling salesman had authority to make this arrangement. At the time the arrangement was made there was no contract in existence. There was a written offer on certain terms, requiring the defendant's acceptance before it would become a contract. In the meantime the traveling salesman who had made the sale in the first place, and had already been informed that defendant would have nothing to do with the transaction, was notified again that defendant would not accept the terms of the proposition contained in the company's letter, and he directed the defendant to receive the plow and turn it over to Jones. In view of the fact that he was the agent who represented the company in appointing the defendant local dealer, and had made the sale or preliminary arrangements for a sale with Jones, it would be quite natural for the defendant to assume, without question, that he had sufficient authority to authorize him to accept the plow and turn it over to Jones. Notwithstanding the manager of the Kansas City branch stated in his testimony that Haynes had no such authority, his testimony, taken all together, indicates that he was not very well informed himself just what was Haynes' authority as agent. In fact, we think it justified the jury in finding that Haynes had authority to do the very thing he did. Before the contract sued upon became effective there had to be an acceptance by the defendant of the terms proposed, and the acceptance, of course, must have been for the purpose comprised in the offer. No limitation of the agent's authority was disclosed, and apparent

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and not actual authority is what is controlling in such a case. (*Aultman v. Knoll*, 71 Kan. 109, 114, 79 Pac. 1074.) We think the acts of Haynes in this case were within the apparent scope of his authority. (*McAdow v. Railway Co.*, 100 Kan. 309, 164 Pac. 177.) The plaintiff was not entitled to the peremptory instruction asked; and the instructions requested were predicated upon the wrong theory with respect to agency, and did not make clear the distinction between apparent and actual authority. Either character of agency, of course, may be proved by circumstantial evidence. The instructions which the court gave fairly stated the law, and since we find no error in the record, the judgment is affirmed.

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No. 21,459.

A. W. MENTZE, *Appellant*, v. F. J. RICE, *Appellee*.

## SYLLABUS BY THE COURT.

CONVERSION OF WHEAT—*Demurrer to Evidence*. A demurrer was sustained to the plaintiff's evidence which entitled him to go to the jury. *Held*, error.

Appeal from Harper district court; GEORGE L. HAY, judge. Opinion filed April 6, 1918. Reversed.

*George E. McMahon*, and *Vernon Day*, both of Anthony, for the appellant; *Leslie Anderson*, of Harper, of counsel.

*J. G. Washbon*, of Harper, *J. N. Tincher*, and *A. L. Noble*, both of Medicine Lodge, for the appellee.

The opinion of the court was delivered by

WEST, J.: The plaintiff sued to recover for the conversion of certain wheat, and from an order sustaining a demurrer to his testimony he appeals.

On or about September 3, 1914, plaintiff deposited in the grain elevator of the E. A. Wales Milling Company at Harper 735 bushels of wheat, taking the following receipt therefor:

"E. A. Wales, Sec'y., Treas., and Gen. Man'gr. Prices subject to change without notice. E. A. Wales Mill Company, Ltd. Capacity: 300 barrels flour, 100 barrels meal. Harper, Kansas, Sep. 3, 1914.

"Recd of Mr. A. W. Mentze 628 bushels test 57 pounds and 107 05-60

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at test 59 pounds for storage at the rate of one half cent per bu. per month and if sold to the mill there is no storage.

"E. A. Wales Mill Co., By E. A. Wales."

About a week later the milling company was incorporated, E. A. Wales becoming its general manager, and the defendant its president and a member of the board of directors. The allegation was that afterwards, and before the 8th of February, 1915, Wales and other officers, agents and servants of the corporation "did willfully and wrongfully convert the said wheat of said plaintiff to the use of said corporation, with the knowledge, acquiescence and consent of said defendant, F. J. Rice."

At about the last-named date plaintiff tendered to Wales at the office of the corporation charges due on the wheat and demanded its return, which was refused. The answer admitted the incorporation on September 9, and that the defendant was the president and a member of the board of directors. There was also an averment that any business done before that date was by Wales individually, and not by the corporation.

Many of the facts were before us in *The State v. Wales*, 98 Kan. 790, 160 Pac. 204. The only question is whether or not the plaintiff's evidence was such as to require its submission to the jury. Counsel for the defendant say in their brief that there were no facts or circumstances shown from which "any reasonable inference could be drawn either that the plaintiff's wheat was converted to the use of the corporation or that the defendant had any knowledge of its disposition, and much less that he consented to or acquiesced in any disposal which was made of it."

The plaintiff, who has received nothing out of the transaction except experience, takes a different view of the evidence.

The rule is that a demurrer to the defendant's evidence should not be sustained unless there is an entire absence of proof tending to show a right to recover. (*Brown v. Cruse*, 90 Kan. 306, 133 Pac. 865.) Such demurrer admits every fact and conclusion which the evidence most favorable to the other party tends to prove. (*Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599.) And it admits, not only the truth of the facts directly proven, but also all that may properly be inferred from those facts. (*City of Syracuse v. Reed*, 46 Kan. 520, 26 Pac. 1040.)

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The court must view the evidence in the light most favorable to the plaintiff and allow all reasonable inferences in his favor. (*Rogers v. Hodgson*, 46 Kan. 276, 26 Pac. 732; *Buoy v. Milling Co.*, 68 Kan. 436, 75 Pac. 466; *Hoffmeier v. Kansas City-Leavenworth Rld. Co.*, 68 Kan. 831, 75 Pac. 1117.)

The plaintiff testified that on February 8, 1915, he tendered the storage money and made a demand for his wheat or the money; that before that he had been to see Mr. Wales, who told him to give him a few days' time, that he was trying to make arrangements to get the money.

"I was at the mill when Wales was gone and talked to Mr. Rice about it. He said of course Mr. Wales would be back."

When he went through the mill and elevator he found it empty.

Mr. Oller testified that he entered into conversation with Mr. Rice in the fall of 1914, who said he was going to start at the ground floor and work up, that he always wanted to be a miller; that while the witness was delivering his wheat there Mr. Rice weighed one load and went to the elevator with him and dumped it into the elevator; that he had wheat deposited there which he was to take out in flour, and Mr. Rice gave him the flour. In the heading to the receipt witness received Mr. F. J. Rice was named as president. Another witness testified that he had a conversation with Mr. Rice about the 27th of January. He and the witness last referred to went to see if they had any wheat in the mill and asked permission of Mr. Rice to go through, and he said they could not do so with his consent; that the next day Mr. Rice met him up town and told him there were about four or five hundred bushels in the mill. Another witness testified that he was employed by the milling company in the fall of 1914 for about three months, and that Mr. Rice was around most of the time.

The defendant himself testified that when the corporation was organized the wheat that was in the mill was not to be taken out and disposed of by Mr. Wales or anybody.

"Mr. Wales was to open up an account with himself. The wheat that was in the mill was n't taken out.

"Q. Just remained there? A. Yes sir.

"Q. It was there when you took possession of the mill—remained there? A. I believe so.



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"Q. You know so, do you not? A. Yes sir.

"Q Was there any arrangement made there between you as to how Mr. Wales was to take his wheat out of the mill, if he had any in there? A. He was to credit himself for it, he was to open up a new set of books. I could n't say whether he done it or not."

Without quoting any further testimony, the foregoing appears to furnish fair grounds for the conclusion, or at least for the inference, that when Mr. Rice went into the elevator and became president of the corporation the plaintiff's wheat was in storage, and that the defendant was the active man, or at least one of the active men, in charge of the concern for several months. It appears that the corporation went into bankruptcy, and *Sweet v. Bank*, 69 Kan. 641, 77 Pac. 538, is invoked in support of the doctrine that the defendant should not be held liable unless he had actual knowledge, but it is not at all probable that during the months he took so active a part he was without knowledge as to what became of the wheat stored in the elevator.

The plaintiff may or may not be entitled to recover in this action. It is simply and only held that his evidence entitled him to go to the jury, and that it was error to sustain a demurrer thereto.

The judgment is reversed and the cause is remanded for further proceedings.

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No. 21,460.

C. W. WINBIGLER, *Appellant*, v. JOHN CLIFT, *Appellee*,

No. 21,461.

THE STATE, ex rel. VERNON DAY, as County Attorney, etc.,  
*Appellee*, v. JOHN CLIFT, *Appellant*,

SYLLABUS BY THE COURT.

1. NUISANCE—*May be Both Private and Public.* A business may be conducted under conditions which will constitute it a private as well as a public nuisance.
2. SAME—*Petition to Abate Private Nuisance—Stated Cause of Action.* On the facts stated in the opinion it was error to sustain a demurrer to the petition in a suit brought by an individual to enjoin the keeping of a horse and mule market in close proximity to his residence.

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3. *SAME—Public Nuisance Shown by the Evidence.* In an action by the state on the relation of the county attorney, it is held that the evidence was sufficient to justify a finding that a horse and mule market conducted by the defendant constituted a public nuisance.

Appeals from Harper district court; GEORGE L. HAY judge. Opinion filed April 6, 1918.

No. 21,460 reversed. *E. C. Wilcox*, and *Donald Muir*, both of Anthony, for the appellant.

*George E. McMahon*, of Anthony, for the appellee; *Don F. Reed*, of Harper, of counsel.

No. 21,461 affirmed. *Don F. Reed*, of Harper, and *George E. McMahon*, of Anthony, for the appellant.

*Vernon Day*, county attorney, for the appellee; *E. C. Wilcox*, and *Donald Muir*, both of Anthony, of counsel.

The opinion of the court was delivered by

PORTER, J.: These cases involve substantially the same facts and have been submitted together. In the first, Dr. C. W. Winbigler seeks to enjoin as a private nuisance the maintenance of a horse and mule market across the street from his residence in the city of Harper. The court sustained a demurrer to his petition, and he appeals. The second suit was brought by the state, on the relation of the county attorney, to enjoin the defendant from maintaining the place, on the ground that it constitutes a public nuisance. The court found against the defendant and ordered the nuisance abated, from which judgment he appeals.

The petition of Dr. Winbigler, to which the court sustained a demurrer, alleges that he owns and resides in a dwelling house on three lots in the city of Harper, situated in one of the desirable residence districts; that the defendant is the owner of a half block immediately east of the plaintiff's residence, separated by a street sixty feet wide, upon which the defendant maintains a horse and mule market; that for several months he has maintained a corral or pen extending to the street in the direction of the plaintiff's residence, in which he keeps and feeds from 50 to 150 horses and mules, permitting them to remain there for such a length of time that manure and filth accumulate in great quantities, causing a noxious

stench to permeate plaintiff's dwelling, injuring the health of the plaintiff and his family and depriving them of the comforts of his home; that the filth attracts large swarms of flies, which infest plaintiff's home; and that the horses and mules are visible from the living room of the plaintiff's residence and are constantly indulging in unsightly practices, by reason of which plaintiff's home is rendered almost uninhabitable.

The demurrer was sustained solely upon the ground that the petition shows a public nuisance, and that the plaintiff has no right to maintain a suit to abate it. The principal case relied upon in support of the ruling is *Jones v. Chanute*, 63 Kan. 243, 65 Pac. 243, which was an action to abate a nuisance caused by filth flowing from a hotel into an open sewer, and where it was held that owners of property along the sewer could not maintain an injunction. A more recent case relied upon by defendant is *Dryden v. Purdy*, 97 Kan. 59, 154 Pac. 221, where the plaintiff sought to enjoin the proprietor of a livery stable from placing buggies in the street in front of his house, his contention being that he suffered annoyance and inconvenience in a manner different from that of the general public, because the vehicles interfered with his view of the public street. It was held that he failed to show that he suffered inconvenience different in kind from that of the public, and that the action could not be maintained.

In *Venard v. Cross*, 8 Kan. 248, the opinion quotes from a note to *Ashby v. White*, 1 Smith's Leading Cases, 364, where it was said:

"There are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another in the kind of injury, though one may be much more injured than another in degree. In such a case, the mode of punishing the wrongdoer is by indictment, and by indictment only. Still, if any person has sustained a particular injury therefrom, beyond that of his fellow citizens (and differing in kind) he may maintain an action in respect of that particular damnification.'" (p. 255.)

Nuisances are sometimes private as well as public, and we think the nuisance complained of here was both.

"The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons

join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief." (29 Cyc. 1213.)

In *Stotler v. Rochelle*, 83 Kan. 86, 109 Pac. 788, the plaintiff sought to enjoin the maintenance of a cancer hospital on property adjacent to her residence, and because her family was frequently subjected to the annoyance of seeing patients afflicted with the disease walking about the premises, and because there was evidence that offensive odors resulting from the disease itself, and from disinfectants used on account of it, might reach the occupants of neighboring dwellings, it was held that the plaintiff had such a peculiar interest in the relief sought as to enable her to maintain the action. It was said in the opinion:

"The injury need not extend beyond annoyance, if in view of all the facts it is unreasonable. For instance, offensive odors, although not injurious to health, have often been held to constitute sufficient ground for injunction." (p. 88.)

See, also, *State v. Lindsay*, 85 Kan. 79, 116 Pac. 207, where the court enjoined the maintenance of a private hospital for insane on the ground that the character of its inmates caused fear, and disturbed the quiet and peace of the community.

There is some conflict in the decisions upon the question, but each case depends largely upon its own facts. Broadly speaking, in order to constitute a private nuisance the individual complaining must suffer annoyance or inconvenience different in kind from that sustained by the public generally, and not merely in a different degree. In this case the petition alleged facts which, in our opinion, showed the existence of a private nuisance, as well as one that might upon the same facts constitute a public nuisance. By reason of the close proximity of plaintiff's residence to the place where the defendant carried on the business in the manner alleged in the petition, not only the health of plaintiff and his family was endangered, but unbearable conditions were shown, which must naturally have caused the plaintiff's family to suffer annoyance differing not alone in degree, but in character, from that sustained by the public generally. The petition stated a cause of action, and it was error to sustain the demurrer.

In the case brought by the state on the relation of the county attorney, the court made findings of fact. No good purpose would be served by setting out the findings in full. The court

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finds the conditions to be practically the same as those alleged in the petition in the case brought by Doctor Winbigler, and finds that a large number of people residing in the vicinity are injuriously affected by the maintenance of the corral, and that the stench arising therefrom is distributed over the neighborhood. The findings show there are no residences on the east half of the block in which defendant's business is conducted; but that immediately west of his property there are four residences, including that of Doctor Winbigler; and in the block north of that there are four others. The findings show that the conditions resulting from the manner in which defendant's business is carried on constitute a public nuisance. There was abundant evidence to sustain the findings. As already observed, notwithstanding the fact that a business may be conducted in a manner so that it constitutes a private nuisance to one or more individuals, it may at the same time constitute a public nuisance.

The defendant objected to the introduction of an affidavit made by Doctor Hays, county health officer, which was intended for use in the Winbigler case. Doctor Hays was confined to his house with sickness at the time the affidavit was made, and died before the case brought by the county attorney was tried. While not taken for use in this particular case, it related to the facts about which the court was investigating, and was used on the motion for a temporary injunction, where affidavits are competent. We do not regard the matter as of much importance, for the reason that the case was tried by the court, and there was sufficient evidence aside from the affidavit to support the findings and judgment. It is claimed the court erred in allowing the probate judge to testify in rebuttal and state the testimony given by the defendant on the hearing for a temporary restraining order in the other case. The testimony which the defendant gave in the other case was competent against him as showing declarations or admissions against interest; and besides, the testimony of the probate judge which related to the number of mules kept at the place was largely cumulative.

Before the court announced its decision, the defendant requested additional findings and submitted a number of special interrogatories, asking the court to answer them. Of course,

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the court was not required to answer special interrogatories. (*Lumber Co. v. Russell*, 93 Kan. 521, 144 Pac. 819.) The findings made were very full and complete, and the refusal to state the additional findings could not have been prejudicial to defendant.

In the Winbigler case the judgment is reversed, and the cause is remanded with directions to overrule the demurrer. The judgment in the case brought by the state is affirmed.

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No. 21,462.

JOHN C. TAYLOR and ADELIA A. TAYLOR, by their Next Friend, ALICE TAYLOR, and CHARLES ROSS TAYLOR, by his Next Friend, ANNA ROSS, *Appellees*, v. THE FARMERS & BANKERS LIFE INSURANCE COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

1. LIFE INSURANCE—*Payment of Premium Note Assumed by Company's Agent—Note in Default—Policy Did Not Lapse.* The defendant insurance company, on receipt from an agent of an application for a policy and a note for the first year's premium, returned the note with a policy to the agent, stating that it had been unable to get satisfactory references on the note.

"However, we are enclosing this policy herewith, although you understand of course that the collateral which we hold, will not, in view of the references which we have, guarantee the payment of this premium, and the delivering of this policy under the circumstances to the insured will be at your own risk."

The agent to whose order the note was made payable, deeming the note good, delivered the policy. *Held*, that this left the company in the attitude of relying on the agent as the ultimate paymaster, and it cannot defeat an action on the policy because the insured did not pay the note.

2. SAME—*Loose Use of Word "Collateral."* A loose use of the word "collateral" and a peculiar method of bookkeeping, held not to affect seriously or materially the real question involved.
3. TRIAL—*Evidence.* Certain rulings on evidence examined, and held not to be substantially prejudicial.
4. TRIAL—*Findings.* The refusal to set aside certain findings of fact was not error.
5. LIFE INSURANCE—*Judgment Modified.* The verdict and judgment being for more than the policy called for, the judgment is modified to conform to the terms of the policy, and thus modified the judgment is affirmed.

Appeal from Cloud district court; JOHN C. HOGIN, judge. Opinion filed April 6, 1918. Modified and affirmed.

*J. A. Brubacher*, of Wichita, *F. W. Sturges*, and *Fred W. Sturges, jr.*, both of Concordia, for the appellant.

*Park B. Pulsifer*, *Charles L. Hunt*, and *Clyde L. Short*, all of Concordia, for the appellees.

The opinion of the court was delivered by

WEST, J.: An agent of the defendant company took the application of Charles L. Taylor for a policy of insurance, the latter giving his note for the premium of the first year, payable to the order of the agent, in the sum of \$163.28. The contract provided that failure to pay such note at maturity should avoid the policy and work a forfeiture of all previous payments, except as provided in the policy. The agent sent the application and note to the company and received acknowledgment of their receipt at the Salina office. Later he received a letter from the home office containing the following:

"We acknowledge receipt of note for \$163.28 on this case. We will at once secure references on this note, and if good will forward you check for two-thirds of your commission as an advance on it, balance of commission to be paid upon payment of the note; if not good, we will advise you at once and await your instructions."

Later he received a letter containing the following:

"With reference to the policy of Charles L. Taylor, whose application you secured some time ago, will advise that we have been unable to get satisfactory references on this note. However, we are enclosing this policy herewith, although you understand of course that the collateral which we hold will not, in view of the references which we have, guarantee the payment of this premium, and the delivering of this policy under the circumstances to the insured will be at your own risk."

The agent, feeling that the applicant would meet the note, delivered the policy to him, and testified that he was willing to have the company charge up against him the net premium, which he was willing to pay whether the insured paid the note or not. The agent was charged with the net amount due the company. Shortly after the issuance of the policy the insured became insane, and later the company wrote the agent as follows:

"Pursuant to your request of the 24th inst., we enclose the C. L. Tay-

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lor note for \$168.28, endorsed with a credit of the unearned premium, \$81.64. Policy No. 3234 lapsed on September 4, 1913."

The insured, shortly after receiving the policy, offered to turn over to the agent two horses in payment of the note, which he declined, and on another occasion offered to go to the bank and get the money and pay the note, but was told by the agent that it was unnecessary to do so. The agent testified that he understood the reference to delivering the policy at his own risk to mean that if he delivered the policy and the note was not paid he would have to pay the net to the company. Upon learning of the insanity of the insured the agent wrote to the company thereof, stating that the agent had not realized on the note and that it might be he could collect it now better than to let it go longer, or that he might get the policy returned, as the father-in-law had refused to pay for the reason that the beneficiary was not the wife of the insured. The company was requested to send the note so that the agent could push the collection or take up the policy. In reply the company forwarded the note, stating "upon collection of same we would request that you kindly forward remittance to cover to this office. I hope that you will either be able to collect it or take up the policy."

When he received the note back from the company it had indorsed thereon "\$81.64 unearned premium," and a notation that the policy had lapsed. The agent testified that the Salina agent had asked permission of him to cancel the policy, stating that he would see that the nets charged against the agent would be credited back. It seems that on final settlement the agent paid one-half of the net, which was \$24.49. The agent testified that he owned the note at the time of trial. It was offered to show by the treasurer that when the policy was issued the company looked to the insured for payment of the note, and in event of its nonpayment by him when due it looked to the agent for the payment of the earned net. On objection this offer was refused. Plaintiff's recovered and the defendant appeals.

In *Marshall v. Insurance Co.*, 98 Kan. 502, 159 Pac. 17, in an action against the same company, it was held that when a premium note is taken by the agent as such and delivered to



the company, and by an arrangement between them he is conditionally charged with the company's share of the premium, the charge to remain if the note is not paid, such note belongs to the company, and when the policy provides that it shall be void unless the note is paid at maturity the failure of the assured to pay the premium and note avoids the policy.

Certain admissions which characterized that case were held to show that credit was not independently extended to the applicant by the agent on his own responsibility.

The controlling question here is whether the company looked to the assured or to the agent for payment of the premium. Substantially all the facts covering this point have been already set forth. There are many others more or less dwelt upon in the briefs, which could be stated, but are not of enough materiality to warrant taking up space with them. It is plain that when the application and note had been received and the latter inquired about at the bank, the company returned both to the agent with directions that it was not satisfied with the note, and that if he desired to deliver the policy he could do so at his own risk. The only fair meaning to be placed on this direction is that if the premium were not paid the company would look to him for the portion thereof earned by it. Of course, it was natural and proper that upon learning that the policy had been delivered the company would hope and look for the payment of the note by the insured. But the real dependence of the company was upon the agent and not upon the applicant. Having seen fit to issue this policy and permit it to be delivered to the assured, looking to the agent for its final source of remuneration, it was substantially in the attitude it would have been in had the agent or some friend purchased the policy for the insured and paid the year's premium therefor.

There was some loose use of the word collateral, there was some peculiar bookkeeping, and there were other matters which give ground for arguments and suggestions, but they are not of enough import to require discussion.

Rulings concerning the omission of evidence are complained of, and while a few of them might well have been different, we find nothing therein amounting to substantially prejudicial error.

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The same may be said concerning instructions given and refused, those which were given being found upon examination to have fairly covered the legal questions involved.

In answer to special questions 3, 4, and 5, the jury said that the defendant never received any money from the first annual premium, except that paid by the agent Swenson, and that that amount was \$24.49. Complaint is made that the trial court did not set aside these findings for lack of evidence to support them, but, as already indicated, final settlement was made between the company and the agent for \$24.49, which seems to be the only money received by the company for the policy.

One matter, however, requires attention. It was alleged in the petition that while the policy covered two one-thousand-dollar gold bonds it was agreed "that at the option of the said beneficiaries it would, instead of issuing said two bonds for \$1,000 each, pay in cash upon the death of assured the sum of \$1,500 for each bond, or the total sum of \$3,000."

The answer contained a general denial. There was no such provision contained in the policy. The case seemed to have proceeded without the attention of the court being called to this matter until on the hearing of motion for new trial, or on motion for judgment on the verdict, although the court instructed the jury if they found for the plaintiff to award \$3,000 with interest, writing the amount in the verdict then submitted, with no exceptions taken to this instruction or this form of verdict. It is contended that in a circular issued by the company there was a statement to the effect that the redemption value of the bond at death was \$1,500, or at the end of the first year \$1,480. But it is admitted that this statement in the circular was not introduced in evidence.

While the matter should have been called to the court's attention earlier, failure to do so is not sufficient reason for requiring the company to go beyond the terms of its policy, which undertook to pay on each bond "\$1,000 in gold coin of United States of America, or its equivalent, and . . . interest . . . at the rate of seven per cent."

Therefore, instead of a judgment for \$3,000 and interest, there should be one for \$2,000 and interest.

The cause is remanded with directions to enter judgment for \$2,000 and interest, instead of \$3,000 and interest, and as thus modified the judgment is affirmed.

No. 21,465.

**THE LYON COUNTY STATE BANK, Appellee, v. GEORGE SCHAEFER, Appellant.****SYLLABUS BY THE COURT.**

1. **BANKING—Sight Draft Deposited for Collection—Dishonored—Relation of Bank to Depositor—Parol Evidence.** Between the original parties—the nominal drawer of a dishonored sight draft, the party for whose benefit the draft was drawn and deposited in a bank for collection, and the bank which honored the checks of such depositor drawn in anticipation of the draft being collected—parol evidence is competent in an action by the bank against the depositor to show the relationship of the parties and the nature and conditions of the deposit.
2. **SAME—Dishonored Sight Draft—Liability of Depositor Thereof.** Ordinarily when a bank gives credit to a depositor on the faith of a sight draft deposited to his account, and such sight draft is dishonored, the bank may charge back to the depositor the amount of the dishonored draft; and if his *bona fide* deposit account is insufficient to meet it, and he refuses to reimburse the bank, the latter may recover judgment against him for the sum involved in the transaction.

Appeal from Lyon district court; WILLIAM C. HARRIS, judge.  
Opinion filed April 6, 1918. Affirmed.

*S. S. Spencer*, and *I. T. Richardson*, both of Emporia, for the appellant.

*Owen S. Samuel*, and *Oscar B. Hartley*, both of Emporia, for the appellee.

The opinion of the court was delivered by

DAWSON, J.: This lawsuit is to determine a liability on a sight draft which was not paid.

The Lyon County Farmers' Produce Association is a voluntary organization designed to bring together the producers and consumers of agricultural products, for which service the association charges a small commission. Anton Ptacek is its manager. The defendant, George Schaefer, is a producer of hay. Through arrangements made by the association, Schaefer shipped a consignment of hay to a man in Iowa. He gave the bill of lading to Ptacek, who drew a sight draft on the consignee payable to the plaintiff bank, and the bank forwarded

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the bill of lading with the draft attached for collection. The bank placed the face amount of the draft (less the association's commission) to the credit of Schaefer, and he checked it out. The draft was dishonored, and Schaefer declined to reimburse the bank.

The trial court made findings of fact and rendered judgment for the bank. The findings read:

"First: On or about April 4th, 1915, one Anton Ptacek left with the plaintiff for collection, four sight drafts with bill of lading attached, representing separate shipments of hay the proceeds to be credited to defendant by said Bank, except a small commission to be credited to Ptacek.

"Second: One of said drafts was for \$139.57. This draft was sent to the Kansas City, Missouri, correspondent of plaintiff, and on April 7th it received notice from its correspondent that it had been credited with said amount, subject to collection, and said amount was credited by plaintiff, subject to collections as follows: \$136.22 to defendant's account, and \$2.35 as commission to the account of Ptacek.

"Third: Said draft was drawn on one Huddleson, of Fontanelle, Iowa.

"Fourth: Before a report was had by plaintiff on the collection of said draft, defendant came to plaintiff bank and asked that he be permitted to check against the proceeds as he was in need of funds, and was given such permission on agreement between defendant and bank that in case said draft was not honored, defendant's account was to be charged with the amount and that defendant would reimburse plaintiff. The exact date of this transaction is not ascertainable from the evidence.

"Fifth: At a later date and about April 20, 1915, defendant came to said Bank with a postal card advising defendant that said hay had been rejected, and asked Mr. Price, President of the plaintiff Bank, what he should do about the matter, and said Price informed defendant that plaintiff had not been advised whether said draft had been paid but if same were dishonored the amount would be charged to defendant's account in case collection was not made and defendant agreed that this should be done.

"Sixth: All of said drafts were collected and passed to defendant's account on the books of said bank, except the Huddleson draft, which was dishonored, and plaintiff was unable to make collection of any part thereof.

"Seventh: Defendant overdrew his account with said bank in the sum of \$136.22, under the arrangement as hereinbefore set out in these findings. Afterward in another transaction said account of defendant was credited with \$2.29, leaving a balance due and owing plaintiff from defendant \$133.93."

Defendant's principal contention on appeal is that there was no competent evidence to support the second finding. The court discerns no difficulty on that point. Ptacek, the man who de-

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livered the draft to the bank, was defendant's agent in so doing, and he told the bank what disposition to make of it. This evidence was competent. (*McWhirt v. McKee*, 6 Kan. 412, syl. ¶ 1; *Lovejoy v. Citizens' Bank*, 23 Kan. 331, syl. ¶ 2; *Ellicott, Assignee, v. Barnes*, 31 Kan. 170, syl. ¶ 2, 1 Pac. 767; *Talcott v. National Bank*, 53 Kan. 480, 36 Pac. 1066; *Hough v. First Nat. Bank*, 173 Iowa, 48; *Branch v. Dawson*, 36 Minn. 193; 7 C. J. 639.)

Furthermore, there was competent evidence showing that Schaefer asked and received permission from the bank to check against the draft deposit before the bank had received the returns on it, and this was upon Schaefer's agreement that if the draft was dishonored he would "make it all right." While Schaefer denies this, this court cannot do otherwise than to accept as true the trial court's determination of that disputed fact. (*Bruington v. Wagoner*, 100 Kan. 439, 164 Pac. 1057.) Even if there was no literal agreement between the bank and Schaefer to "make it all right," the law would infer such an agreement and impose such a liability on Schaefer. The general rule appears to be that, where the interests of innocent third parties are not affected, a bank has the right to charge back a dishonored draft which has been credited to a depositor's account as cash. Credit extended to a depositor in anticipation of collection of a draft is ordinarily deemed provisional, and the bank may cancel the credit or charge back the paper to the depositor's account, if it is not paid. (*Prescott v. Leonard*, 32 Kan. 142, 4 Pac. 172; *Noble v. Doughten*, 72 Kan. 336, 345, 346, 83 Pac. 1048; *City of Philadelphia v. Eckels*, 98 Fed. 485; *First National Bank v. McMillan*, 15 Ga. App. 319; *Ayres v. The Farmers & Merchants Bank*, 79 Mo. 421; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20; *Jacob v. First National Bank*, 5 Ohio Dec. 572; *Rapp v. National Bank*, 136 Pa. St. 426; 7 C. J. 633.)

Counsel presents a line of argument based on the assumption that the obligation to reimburse the bank was on Ptacek, and not on Schaefer, and that Schaefer's promise to "make it all right" was an unenforceable oral promise to answer for Ptacek's debt. But between the original parties, Schaefer, Ptacek, and the bank, there was no debt, no liability on the part of Ptacek. The mere form of the draft was not important.

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The true relationship of the parties was a proper subject of judicial inquiry. (3 R. C. L. 1122, 1123.) Ptacek, or Ptacek's produce association, was only the nominal drawer of the draft; it was drawn in Schaefer's behalf, and he received the benefits of it from the bank. (Gen. Stat. 1915, § 6588; 3 R. C. L. 1140.) It was to "make it all right" on a transaction of his own, not Ptacek's, that Schaefer made the promise.

Aside from the brief of his counsel, the defendant addresses a personal letter to the court, urging matters which a supreme court has no right to consider. Doubtless the defendant did not understand that the case we have to review is the one which was tried by the district court, and that we have no authority to make an independent investigation of the matter. But we can only examine the record which the appellant has brought to this court. It is only with alleged errors made in the trial court that the supreme court has to deal, and no error made by the trial court in this case is shown in the record. Consequently the judgment must be affirmed, and it is so ordered.

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No. 21,466.

A. E. BUXTON, *Appellee*, v. C. B. D. COLVER, *Appellant*.

SYLLABUS BY THE COURT.

1. **REAL-ESTATE BROKER**—*Binding Contract by Correspondence.* Correspondence between a landowner and a broker by letters and telegrams, relating to finding a purchaser for land and to the commission to be paid, is held to constitute a binding contract between them, and the interpretation of such a contract is a question of law for the court.
2. **SAME**—*Complete and Unambiguous Contract—May Not be Modified by Parol.* The contract, being complete and unambiguous and having provided for the payment of a specified commission if a purchaser of land was procured by the broker on stipulated terms, without any limitations as to the person to whom the sale might be made, must be regarded as a complete expression of the entire agreement as to commission, and it cannot be contradicted, added to, or modified by parol evidence of a prior oral agreement to the effect that no commission was to be paid if a sale was made to a particular person.

Appeal from Edwards district court; ALBERT S. FOULKS, judge. Opinion filed April 6, 1918. Affirmed.

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*M. A. Merten*, of Hoisington, and *W. E. Broadie*, of Kinsley, for the appellant.

*A. L. Moffat*, of Kinsley, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: This was an action to recover a real-estate agent's commission. Plaintiff alleged that the defendant made a written contract authorizing the plaintiff to sell certain real estate owned by defendant, and the following letter from the defendant to the plaintiff under date of October 6, 1916, was set forth as constituting that contract:

"In reply to yours of the 5th asking if I would sell the W ½ of sec. 4 25 21 for \$47.50 per acre, ¼ cash, balance five years at 7 per cent and allow you the regular commission. I cannot let this land go for less than \$50.00 per acre and this price is subject to prior sale or change without notice. . . . P. S. This \$50.00 price of course is subject to the regular commission of 5 per cent on the first \$1,000.00 and 2½ on the balance."

Plaintiff alleged that by this contract defendant agreed that if plaintiff should be in any manner instrumental in selling the property or producing a buyer at the price named, defendant would pay plaintiff the commission mentioned. Plaintiff further alleged that he accepted the proposition of defendant, and that in pursuance of the contract so made he sold the land on October 27, 1916, to Jacob Konradi at \$50 per acre, and immediately sent defendant the following telegram:

"Have sold your west half section 4 25 21 Ford county, . . . You to furnish abstract showing good merchantable title and pay me regular commission as stated in your correspondence. Wire acceptance immediately."

The defendant then sent the following telegram on October 27: "Your offer accepted send me contract for execution."

A contract of sale was prepared by plaintiff, signed by Konradi and sent to defendant, who, together with his wife, signed it and returned it to the plaintiff for delivery to the purchaser, who is and always has been ready and willing to pay for the land according to the contract. Plaintiff asked a recovery of \$425 claimed as commission, with interest.

In the answer of the defendant, as finally amended, he admitted the correspondence and the execution of the contract

already mentioned, but he alleged that the land had been listed with plaintiff at \$50 per acre sometime in 1915, and that before the correspondence was had and about July, 1916, the parties made an oral agreement that plaintiff was to receive no commission if the land was sold to Jacob Konradi, as the latter had been dealing directly with the defendant, and that the letters and telegrams mentioned "were only for the purpose of inducing the defendant to sell for a less price, of reiterating the terms of the original listing, and of clearing up any possible uncertainties and misunderstandings."

The court, upon motion of the plaintiff, struck out the averments as to a prior oral agreement, and upon a stipulation between the parties to the effect that the written correspondence was correctly set out in the plaintiff's petition, that the contract executed between defendant and Konradi attached to the petition had been procured through the efforts of plaintiff, and, further, that no commission had ever been paid, the court excluded testimony of prior negotiations and gave judgment for plaintiff, from which defendant appeals.

The contention of the defendant is that the writings constituted but a part of the contract between them, and were not conclusive upon him, and, therefore, he should have been allowed to show the earlier oral negotiations and agreements. A binding contract may be made by the interchange of letters and telegrams, and the interpretation of such contract is a question of law for the court. (*Shear Co. v. Thompson*, 80 Kan. 467, 102 Pac. 848.) The contract involved here is complete and unambiguous, and there being no claim that it was induced by deceit, it is as conclusive upon the parties as if it had been reduced to a single writing in the most solemn form. It must be regarded as a complete expression of the entire agreement and as embodying all prior agreements and understandings. To allow it to be altered, added to, or modified, would be to substitute a new contract for the one deliberately made by the parties. (*Rose v. Lanyon*, 68 Kan. 126, 74 Pac. 625; *Shear Co. v. Thompson*, 80 Kan. 467, 102 Pac. 848; *Mill & Elevator Co. v. Saunders*, 96 Kan. 459, 152 Pac. 622.) The subject of procuring a purchaser, and the commission to be paid if one was found, was included in and became a part of the written agreement, and all prior negotiations and understandings relating to the commission must be deemed to be merged in that



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agreement. According to the agreement, the commission was to be paid when a purchaser was procured, regardless of the person procured. By its terms the only limitation upon the plaintiff was to find a purchaser for the land at the price fixed, namely, \$50 per acre; and when a purchaser was found ready to take the land at that price the commission was earned. No limitation was made as to the field or class from which a purchaser might be taken, and to add an exception that a commission should not be paid if the land was sold to a particular person would directly conflict with the written stipulation. The defendant insists that the written contract is evidently only a part of the agreement of the parties, and he complains that he was not permitted to show that the writing was only a partial statement of the prior parol agreements. The writings import on their face to be a complete expression of the whole agreement. It has been said that—

“The writing cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not contained in the written agreement, nor can parol evidence be admitted to prove a contemporaneous agreement that a written instrument which appears upon its face to be duly executed, intelligible, unambiguous, reasonable, and complete, should be considered only as the basis or outline of a contract to be subsequently filled out with stipulations other than those contained in the writing.” (17 Cyc. 716.)

Defendant appears to have proceeded for a time upon the theory that he was bound by the written agreement. When defendant was informed that a purchaser had been found, and that he was to pay a stipulated commission, he signed a contract in which Konradi was named as the purchaser. He closed the transaction knowing to whom the sale had been made, and knowing also that the regular commission was required of him. In a way, he recognized his liability to pay a commission by executing a contract of sale after he had discovered that Konradi was the purchaser and that a commission was demanded.

However, he was clearly bound by the terms of the written contract, and therefore the judgment is affirmed.

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Railway Co. v. Young.

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No. 21,469.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant, v. W. S. YOUNG and H. W. YOUNG, Partners, etc., Appellees.

## SYLLABUS BY THE COURT.

1. INTERSTATE COMMERCE—*Established Rates—Binding Alike on Shipper and Carrier.* A schedule of freight rates duly filed and published by a railroad company, and not disapproved by the interstate commerce commission, has the force of a statute, binding alike on shipper and carrier.
2. SAME—*Classification of Commodities—Binding on Court.* In an action to recover the amount of undercharges for freight shipments, computed according to schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles.

Appeal from Reno district court; FRANK F. PRIGG, judge. Opinion filed April 6, 1918. Reversed.

*William R. Smith, Owen J. Wood, and Alfred A. Scott, all of Topeka, for the appellant.*

*Warren H. White, of Hutchinson, for the appellees.*

The opinion of the court was delivered by

BURCH, J.: The action was one to recover the amount of undercharges for freight on two mixed carloads of commodities known as "digester tankage" and "meat scraps." The defendant recovered, and the plaintiff appeals.

The following facts were agreed to:

"5. That the published tariffs and classifications of the plaintiff company, duly filed with the interstate commerce commission and in force and effect at the times of the aforesaid shipments, do not specifically list the commodity 'meat scraps' by such name under any item of any classification.

"6. That there was in force and effect at the time the cars mentioned in plaintiff's petition moved, western classification No. 52 and certain tariffs all of which had been filed with the interstate commerce commission and the provisions of these classifications and tariffs so far as they related to the shipments in question are as follows:

"The tariffs provided for a charge of forty cents per hundredweight on fourth-class matter, and for a charge of twelve cents per hundredweight on shipments in carload lots of matter rated as class E.

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"Western classification No. 52 was in effect and provided on page 209, item 12, as follows:

"'PACKING HOUSE PRODUCTS.

*Digester Tankage, Blood Meal, Meat Meal,  
and Blood Flour.*

|   |    |
|---|----|
| In bags, barrels or boxes, L. C. L.....                                 | 4  |
| In packages named, straight or mixed C. L., Min. Wt.<br>30,000 lbs..... | E' |

"If this provision is applicable to the shipment in question, then the freight charges originally collected are correct, and the plaintiff cannot recover.

"7. Said classification No. 52, item 11, page 73, was as follows:

"'ANIMAL AND POULTRY FOODS AND MEDICINES.

*Animal and Poultry Foods, not otherwise indexed  
by name. Tonics and Regulators, Dry, prepared:*

|  |         |
|--|---------|
| Invoice value not exceeding 10 cents per pound and so re-<br>ceived for, in bags, barrels, boxes or pails, min. C. L.<br>wt. 30,000 lbs..... | 4.... B |
| Invoice value exceeding 10 cents per pound or value not<br>stated, in bags, barrels, boxes or pails.....                                     | 1'      |

"Item No. 14 on the same page is as follows:

"'Poultry Food:

*Ground Meat, dried, Ground Bone. Alfalfa Meal,  
Cut Clover, Grain, whole or cracked, Grain Screen-  
ings, Millet Screenings, Crushed Shells, Grit and  
Charcoal:*

|   |    |
|---|----|
| In bags, L. C. L.....                   | 4  |
| In bags, C. L. Min. Wt. 30,000 lbs..... | B' |

"If either of these items are applicable to the shipment in question, then the freight charges originally collected were insufficient, and the plaintiff is entitled to recover the difference between the two rates, being the amount prayed for in plaintiff's petition."

Proof was offered and received indicating that the common packing-house product known to the trade as "meat meal" is identical with the product manufactured and sold by Swift & Company under the name of "meat scraps." Meat meal and meat scraps are used to feed hogs and poultry, and there are coarse and fine grades of each. There was no evidence to the contrary, and the court directed the verdict.

On one side it is said that bulk, weight, value, risk, and like factors, furnish the true basis for freight classifications; that a mere difference in trade name of the same commodity does not authorize a difference in freight rates; and that because the commodity known as meat scraps is in fact identical with the

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commodity known as meat meal, both are governed by the meat-meal item of the schedule. On the other side it is said that a tariff schedule, duly filed and published, has the force of a statute. If ambiguous, the court may interpret it, but when its meaning is ascertained it operates as law, which the court must apply as any other law. Meat meal is indexed by name. Animal and poultry foods not otherwise indexed by name are governed by a different rate. Meat scraps are nowhere mentioned, and consequently fall within the provision relating to animal and poultry foods not indexed by name.

The plaintiff is right in its contention that a tariff has the force of a statute, binding alike on shipper and carrier. (*Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197.) There is no ambiguity in the tariff under consideration. When the name, meat scraps, originated does not appear. It cannot be assumed that the commodity, meat scraps, was not listed by that name because it was already listed under a different name, meat meal. In the case of *The Andrews Soap Co. v. P., C. & St. L. Ry. Co. et al.*, 4 I. C. C. 41, it was said:

"A manufacturer's description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates. Carriers are not required to analyze freight to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value." (syl. ¶ 1.)

Conceding that the defendants are right about what constitutes the proper basis for freight classifications, and that the identity of meat meal and meat scraps may afford good ground for modification of the tariff, the facts warranting modification must be ascertained and the modification made by the only tribunal having jurisdiction of the subject, the interstate commerce commission. Tariffs must be uniform, and cannot be enforced in terms, or not enforced in terms, according to the divergent views of different juries, based on testimony more or less illuminating, of witnesses more or less interested and informed. It is true that in this instance the testimony was all one way, but the court was not authorized to receive it. So long as the tariff stands, with the approval of the only body competent to change it, the courts can do nothing but enforce it.

The judgment of the district court is reversed, and the cause is remanded with direction to enter judgment for the plaintiff.

No. 21,471.

*In re* THE ESTATE OF JACOB KOEHLER, Deceased. (ANTOINETTE LOUISE KOEHLER, *Appellant*, v. F. H. GRAY, as Administrator, etc., *Appellee*.)

## SYLLABUS BY THE COURT.

1. **HOMESTEAD—Findings—No Abandonment.** Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that she considered that city as her residence, held to imply that she intended to return to the property and occupy it as a home.
2. **SAME—Death of Both Parents—Homestead Exempt to Unmarried Daughter.** Property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death of himself (intestate) and his wife, so long as an unmarried daughter of full age, who had lived with him as a part of his family, continues her residence thereon without interruption. *Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, overruled.
3. **SAME—Taken by Right of Eminent Domain—Disposition of Proceeds Among Heirs.** Where the daughter of an intestate occupies his homestead under such circumstances as to render it exempt from liability for his debts, and the property is taken for public purposes by eminent domain, she is entitled to compensation, not only for the share of the property owned by her, but also for the right to occupy the whole.

Appeal from Miami district court; JABEZ O. RANKIN, judge. Opinion filed April 6, 1918. Reversed.

*Edwin S. McAnany, Maurice L. Alden, Thomas M. Van Cleave*, all of Kansas City, and *Frank L. Barry*, of Kansas City, Mo., for the appellant; *Samuel Maher*, of Kansas City, of counsel.

*R. E. Coughlin*, and *Edward H. Coughlin*, both of Paola, for the appellee.

The opinion of the court was delivered by

MASON, J.: Jacob Koehler died intestate in May, 1914, owning a house and a tract of land in Paola, occupied as a homestead by himself, his wife, and an unmarried daughter, Antoinette Louise Koehler, then twenty-one years old. He was survived by five other children, all of full age, having homes

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elsewhere. His widow died in August, 1916. In December, 1916, the administrator of his estate applied for an order from the probate court for the sale of the property referred to, in order to apply the proceeds to the payment of his indebtedness, which exceeded the other assets by about \$11,000. The daughter, Antoinette Louise Koehler, objected to the sale on the ground that the property was still occupied by her, and was exempt by reason of its character as a homestead. The probate court granted the order, and on an appeal to the district court its decision was affirmed. The daughter now appeals to this court.

1. The administrator contends that upon any theory of the homestead law the judgment must be affirmed, because at the time the order of sale was granted the appellant had ceased to occupy the property as a home. The district court made these findings bearing upon the matter:

"After the death of Jacob Koehler the widow and the appellant continued for a time to occupy the homestead for about a year, after which they rented the homestead and went to New York City temporarily, partly on account of the health of the mother and partly that the appellant might study music. They did not intend to establish a permanent home in New York.

"The widow died August 22, 1916, and soon after the household goods that were still in the homestead were divided up among the children, the appellant retaining a portion of them, but they were all removed from the real estate in question, and the appellant returned to New York in October, 1916, for the purpose of continuing her musical studies.

"The appellant, Antoinette Koehler, does not intend to remain permanently in New York, but intends to go elsewhere, probably to Kansas City, for the purpose of teaching music, but considers Paola as her place of residence.

"At the time of the filing of this application in the Probate Court the appellant, Antoinette Koehler, had not abandoned her residence in Paola, Kansas."

The administrator insists that these findings merely show that the appellant retains her legal residence in Paola, and do not necessarily imply that she intends to make her home in the house where the family formerly lived. It is true that no explicit statement is made that she has had, and still retains, such an intention, but we think the findings that she considers Paola as her residence and had not abandoned her residence there must be given that effect. There is no suggestion that she

ever had a residence in Paola elsewhere than on the property in question. That at one time was her residence. If her legal residence remained in Paola, it remained at the old home. The findings that she considered Paola her residence and had not abandoned her residence there must be regarded as referring to the property in question, and as implying an intention to return thereto; otherwise they would have no bearing upon the issues to be determined. If the trial court had been of the opinion that the appellant did not (at the time the controversy arose) intend to reoccupy the house, a finding would naturally have been made that she had abandoned the homestead as such, thus finally disposing of her claim of exemption.

2. The question for determination, therefore, is whether property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death of himself (intestate) and his wife, so long as an unmarried daughter of full age, who had lived with him as a part of his family, continues her residence thereon without interruption. The trial court followed the decision of this court in *Battey v. Barker*, 62 Kan. 517, 64 Pac. 79, in which substantially the same question is explicitly answered in the negative, and unless that case is overruled the judgment here must be affirmed. In that case it was suggested that a homestead necessarily loses its exempt character whenever it is liable to partition, and *Dayton v. Donart*, 22 Kan. 256, is cited in support of the suggestion. There, however, it was the abandonment of occupancy that rendered the property liable to sale. Actual partition does not necessarily destroy all homestead exemption (*Trumbly v. Martell*, 61 Kan. 703, 705, 60 Pac. 741; *Cross v. Benson*, 68 Kan. 495, 505, 75 Pac. 558), and mere liability to partition should not be deemed to affect it.

The decision in the *Battey-Barker* case, however, was largely influenced by the view that, inasmuch as "the homestead laws apply only to families, and not to single individuals, and apply only where the family occupies the homestead as a residence" (*Farlin v. Sook*, 26 Kan. 397, 404), the death of the father, leaving of the former members of his family only an adult daughter, destroyed the family relation, and with it the homestead character of the property. In *Cross v. Benson*, 68 Kan.

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495, 76 Pac. 558, it was held that property occupied as a homestead by the owner and his wife remained exempt from sale for his debts after his death, so long as his widow still lived there, on the ground that it was still "occupied as a residence by the family of the owner" within the meaning of that phrase as used in the constitution (Art. 15, § 9), because she continued to be "the family of the owner" of the property. In the opinion it was said:

"Some affirmations by way of argument and illustration appear to be opposed to the view here taken. But upon a careful discrimination of the precise points determined it will appear that no former decision need now be overturned. The case of *Batley v. Barker*, 62 Kan. 517, 64 Pac. 74, 56 L. R. A. 33, is most in conflict. The doctrine there applied is the strict one upon which *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, is based. In the latter case it was held that a sole adult remnant could not himself constitute his own family, so as to preserve land exempt from the payment of his own debts." (p. 509.)

The Ellinger-Thomas case was overruled in *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, where it was determined that while a homestead cannot originate without the existence of a household consisting of more than one person, it may persist for the benefit of a single individual who is the sole survivor of the family. There the survivor was the widow of the former owner, and the rule as stated was limited to the survivorship of the husband or wife. We think, however, upon the same reasoning it should be extended to any member of the family. The exemption is for the benefit of the family as a whole, and of each individual composing it, so long as the relation is not severed. (13 R. C. L. 545.) The circumstance that a daughter has arrived at majority should not, in our judgment, prevent her from being considered a part of her father's family. (*C. & N. W. Ry. Co. v. Chisholm, jr.*, 79 Ill. 584; *Strawn et al. v. Strawn*, 53 Ill. 263; *Brooks &c. v. Collins*, 74 Ky. 622; *In re Rafferty*, 112 Fed. 512; 2 Words and Phrases, 2d series, 464), although there is some conflict of opinion on the question. (13 R. C. L. 554, 555.) Nor is it necessary to that relation that there should be a legal duty to support her. (13 R. C. L. 553.) The fact that the statute authorizes the partition of the property whenever the youngest child has reached majority (Gen. Stat. 1915, § 3828), irrespective of its continued occupancy as



a homestead, does not affect the matter, for liability to sale for the purpose of partition is wholly distinct from, and independent of, liability to sale for the payment of debts. (*Towle v. Towle*, 81 Kan. 675, 107 Pac. 228.) The appellant was a constituent part of the family as it existed in the lifetime of her father and mother. By no act of hers has her relation to the family or the property been altered. She remains in the occupancy of the homestead. In the same sense in which the phrase was used in *Cross v. Benson*, she was "the family of the owner"—she was all that was left of it. We conclude, overruling *Battey v. Barker*, 62 Kan. 517, 64 Pac. 79, that the property was exempt from sale on order of the probate court.

3. After the issuance of the order of sale the board of education were about to condemn the property for a school site. A stipulation was entered into by the parties to this litigation, to the effect that condemnation proceedings should be waived, the board should have the property for the agreed sum of \$4,200, which should be paid into court and disbursed in accordance with the final decision herein, the rights of none of the parties to be affected by the agreement. It seems to be assumed on both sides that all the money will go to the appellant or appellee. However, the concluding clause of the stipulation referred to reads:

"Should the appellant, Antoinette Louise Koehler, be successful in such [this] adjudication, then the said fund shall be payable to her, or to whomsoever is entitled to the same."

The question as to just what disposition should be made of the fund has not been discussed by counsel. The problem seems to be one as to the distribution of the amount awarded for property taken by eminent domain, where there are various interests to be considered. The appellant is clearly entitled to a share of the amount proportionate to the share of the property which she owns outright as an heir of her father, and as an heir or devisee of her mother. She is (or was) entitled to occupy the entire property, unless it should be partitioned, so long as she saw fit to preserve the existing status. This was a valuable right, difficult but not necessarily impossible of appraisal, for which it would seem she should be compensated. The interests of the other owners of the property were subject to her right of occupancy, and were dimin-

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ished in value to that extent. As these owners are entitled to no exemptions on their own behalf, the remainder of the fund, after the payment to the appellant of her share, should doubtless go to the administrator.

The judgment is reversed, and the cause is remanded for further proceedings in accordance herewith.

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No. 21,478.

STELLA KUNZ, *Appellant*, v. W. H. ALLEN and CHARLES H. BAYNE, Partners, etc., *Appellees*.

## SYLLABUS BY THE COURT.

TORT—*Exhibition of Photograph in Moving Picture—Rights of Privacy—Damages.* The exhibition in a moving-picture theater of the photograph of a person taken without her consent and for the purpose of exploiting the publisher's business, is a violation of the right of privacy, and entitles her to recover without proof of special damage.

Appeal from Wyandotte district court, division No. 3; WILLIAM H. MCCAMISH, judge. Opinion filed April 6, 1918. Reversed.

*Winfield Freeman*, of Kansas City, for the appellant.

*Thomas J. White*, and *J. H. Reeder*, both of Kansas City, for the appellees.

The opinion of the court was delivered by

PORTER, J.: While plaintiff was in the dry-goods store of defendants for the purpose of making some purchases, the defendants, without her knowledge, caused moving picture films to be taken of her face, form, and garments, and afterwards procured the films to be developed, enlarged, and used to advertise their business, by public exhibition in a moving-picture theater in the neighborhood where she lived, by reason of which, the petition alleged, she became the common talk of the people in the community; it being understood and believed among the people generally that she had for hire permitted her picture to be taken and used as a public advertisement. The answer was a general denial. The court sustained a demurrer to the plaintiff's evidence, and she appeals.

The principal ground upon which it is claimed the demurrer was sustained, is that the plaintiff failed to prove any actual damages. This was not necessary. (*Schaap v. Hayes*, 99 Kan. 36, 160 Pac. 977; *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190.) In the first case cited, the action was for damages on account of an assault and battery. It was held not necessary, in order to make a cause for the jury, that any witness should estimate in dollars and cents the extent of plaintiff's suffering. The opinion quoted with approval the following extract from 8 R. C. L. 653:

"It is unnecessary to submit any evidence as to the value of mental and physical pain and suffering and humiliation, and the amount of damages to compensate therefor, since this is a question exclusively for the jury." (p. 37.)

Other authorities cited in the opinion are: 8 A. & E. Encycl. of L. 659; 1 Sedgwick on Damages, 9th ed., § 171a; 1 Bouvier's Law Dictionary, 3d revision (8th ed.), page 751.

In the other case cited, the supreme court of Georgia ruled:

"The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage." (syl. ¶ 11.)

In the opinion it was said:

"The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. . . . Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law." (p. 194.)

In another place in the opinion it was said:

"If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon-keeper, or decorate the walls of a brothel. By becoming a member of society, neither man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas." (p. 218.)

In *Munden v. Harris, et al.*, 134 S. W. 1076, (153 Mo. App. 652) the Missouri court of appeals held:

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Minturn v. Manufacturing Co.

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"One has the exclusive right to his picture as a property right of material profit, and, unless he has expressly or impliedly consented to its use by others, he may sue at law for damages for the invasion of the right." (syl. ¶ 3.)

"Where one's exclusive right to his picture is invaded, special damages, though recoverable, if demanded, are not necessary in an action at law for damages, and general damages are recoverable without a showing of specific loss." (syl. ¶ 4.)

Some of the witnesses for the plaintiff on cross-examination admitted that the publication of the plaintiff's picture did not have the effect to lessen their esteem for her. It is seriously argued that this evidence conclusively established the fact that plaintiff had not sustained any damage. On the contrary it merely proved the sincerity of the friendship the witnesses entertained for plaintiff.

The court seems to have unduly limited the proof offered by the plaintiff for the purpose of showing that the publication of the picture caused her to be talked about commonly in the neighborhood, but this can be corrected on another trial.

The judgment is reversed, with directions to overrule the demurrer. ✓

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No. 21,479.

HAROLD MINTURN, by his Next Friend, MARTHA MINTURN;  
*Appellee*, v. THE PROCTOR & GAMBLE MANUFACTURING  
COMPANY, *Appellant*.

## SYLLABUS BY THE COURT.

COMPENSATION ACT—*Injury to Minor—Presentation of Claim—Statute of Limitations*. The action of a minor by his next friend to recover under the workmen's compensation act is not barred because the written claim for compensation was not served within three months from the date of the injury—no guardian having been appointed. (Gen. Stat. 1915, § 5904.)

Appeal from Wyandotte district court, division No. 1;  
EDWARD L. FISCHER, judge. Opinion filed April 6, 1918.  
Affirmed.

J. K. Cubbison, and William G. Holt, both of Kansas City,  
for the appellant.

Henry Meade, W. J. McCarty, and W. C. Rickel, all of  
Kansas City, for the appellee.

The opinion of the court was delivered by

WEST, J.: A minor, by his next friend, brought this action to recover under the workmen's compensation act for an injury to his hand, received while working in the defendant's plant. A demurrer to his evidence was overruled, and a recovery was had. The defendant appeals, and contends that the plaintiff cannot prevail because the three months' claim for compensation provided by the statute was not given, six months having elapsed before the defendant was notified.

Section 22 of the original act, as amended by the act of 1913, (Gen. Stat. 1915, § 5916) provides that the action shall not be maintainable unless a claim for compensation has been made within three months after the accident, or, in case of death, within six months from the date thereof. If this statute governed, the defendant would be correct in its position. But section 5904 of the General Statutes of 1915 provides:

"In case an injured workman is mentally incompetent or a minor . . . at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian."

The petition alleged that no guardian had been appointed, and that the minor was twenty years of age. The action was begun January 15, 1917, and the injury occurred August 10, 1916. A written claim for compensation was served by him January 15, 1917, signed by his mother and next friend, no guardian having been appointed. This met the requirements of the statute, and the action is not barred.

The judgment is affirmed.

No. 21,500.

**ALFRED ZANE, Appellant, v. MARY ZANE VAWTER, Appellee.**

## SYLLABUS BY THE COURT.

**VENUE—Action to Compel Reconveyance of Land—Deed Procured by Fraud—Action Transitory.** An action to compel the defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud is transitory and not local, and may be brought in any county where personal service can be had upon him. The statute requiring actions “for the determination in any form” of an interest in real property to be brought in the county where it is situated relates only to actions in which such result is sought by means operating directly upon the property, and does not apply to those by which the conduct of the defendant is sought to be controlled, although the title to the property may thereby be affected.

Appeal from Shawnee district court, division No. 1; **ALSTON W. DANA**, judge. Opinion filed April 6, 1918. Reversed.

**D. R. Hite**, of Topeka, for the appellant.

**A. M. Harvey**, and **J. E. Addington**, both of Topeka, for the appellee.

The opinion of the court was delivered by

**MASON, J.:** Alfred Zane brought an action in Shawnee county against Mary Zane Vawter, who first filed an answer, and afterwards moved to dismiss the case for the reason that the court had no jurisdiction of the subject matter. The motion was sustained, and the plaintiff appeals.

The petition alleges that the plaintiff is an heir of Susan Zane, who in her lifetime was the owner of a quarter section of land in Kingman county; and that the defendant by fraud obtained from her a deed to the land. The prayer is that the deed be set aside and the defendant be directed to deliver it up for cancellation, and “also for such other and further relief as may be consistent with the premises and with the principles of equity.” The case was dismissed on the theory that the action was local and could only be maintained in Kingman county. The statute includes in the enumeration of actions which “must be brought in the county in which the subject of the action is

situated" those "for the recovery of real property, or of any estate or interest therein, or for the determination in any form of any such right or interest, or to bar any defendant therefrom." (Gen. Stat. 1915, § 6938.) Jurisdiction of an action of the character described in the language quoted is exclusive in the district court of the county in which the real property is situated. (*Randall v. Ross*, 94 Kan. 708, 147 Pac. 72.) The present case in one aspect falls within the description. So far as the relief sought is the setting aside of the deed, and that is specifically asked, the action is local and cannot be maintained in Shawnee county. But the plaintiff also asks for any equitable relief to which he may be entitled, and the dismissal was erroneous if the facts stated are such as to authorize any relief which the court had jurisdiction to order and enforce, for a prayer for relief which the court has no power to grant does not vitiate the pleading, but may be rejected as surplusage. The district court of Shawnee county could not render any effective decree operating directly upon the title to or possession of land in Kingman county. It could not cancel the deed executed by the plaintiff's ancestor. If it could order the surrender of the deed, that would not be an effective remedy, for such surrender would not necessarily cause the title to revert in the grantor, or in the grantor's heirs. But it could, upon a sufficient showing, order the defendant to execute a deed to the plaintiff. If the district court of Kingman county were to make such an order, and it should not be complied with, the judgment itself would operate as a conveyance. (Gen. Stat. 1915, § 7302.) No such effect could be given the decree of the Shawnee district court, for it has no jurisdiction over the land. But although that court has no control over the "*rem.*" it has over the person of the defendant, and it may, in the exercise of its equitable jurisdiction, investigate the allegations of fraud, and, if it finds them well founded, direct the defendant to take such action as will rectify the wrong, and undertake to compel obedience thereto by process directed against her personally. True, the remedy thus afforded is not complete. If the court should order the defendant to execute a deed and she should be committed for contempt in refusing to do so, the title would remain unchanged until she should see fit to act, and the court would have no power to affect it directly in any way.

The remedy could not on that account, however, be regarded as necessarily ineffectual. The presumption should be that the order of the court would be obeyed, rather than that it would be disregarded. (*Meador v. Manlove*, 97 Kan. 706, 709, 156 Pac. 731.) Moreover, in a subsequent local action in Kingman county the decision in Shawnee county might be invoked as a conclusive adjudication upon the issue whether or not fraud had been committed.

These conclusions follow from the application of principles upon which there is a substantial agreement of judicial opinion. Courts frequently render judgments against persons, the effect of which is to constrain action affecting the title even to lands in other states. (Notes, 69 L. R. A. 673; 23 L. R. A., n. s., 924.)

"It is well settled that actions involving title and possession of real property are local in character and can be tried only in the state wherein the land lies, but it is equally well settled that, jurisdiction having been acquired, equitable relief may be afforded without regard to the location of the subject matter where it is enforceable against the person of the defendant." (*Caldwell v. Newton*, 99 Kan. 846, 848, 163 Pac. 163.)

An action brought by the plaintiff in Shawnee county, to compel the defendant to execute a deed conveying to him land in Kingman county, is not (within the meaning of the statute) one "for the recovery of real property, or of any estate or interest therein, or for the determination in any form of any such right or interest, or to bar any defendant therefrom," because such statutory language is generally (and as we think, rightly) construed to refer only to proceedings for the *direct* accomplishment of the results indicated, by a judgment operating upon the property itself. That interpretation detracts nothing from the efficacy of the law with respect to its chief purpose—to require transactions affecting the title to real estate to be of record where it is situated. It is based upon the well recognized distinction already referred to between decrees which in themselves determine or affect titles, and those which by operating upon the defendant personally may indirectly bring about such a changed condition through action on his part. (40 Cyc. 57-60.)

The judgment is reversed, and the cause is remanded with directions to overrule the motion to dismiss.



No. 21,614.

KATIE A. OSBORN, *Appellant*, v. WILLIAM F. OSBORN, as  
Executor, etc., et al., *Appellees*.

## SYLLABUS BY THE COURT.

1. **DESCENTS AND DISTRIBUTIONS—*Widow's Interest in Her Deceased Husband's Real Estate.*** Section 3831 of the General Statutes of 1915, providing that under certain circumstances a widow shall be entitled to one-half in value of real estate in which her husband in his lifetime had a legal or equitable interest, refers to legal or equitable interest capable of inheritance, and does not apply to interests in land which were extinguished by the husband's death.
2. **SAME—*Widow No Interest in Husband's Life Estate.*** A widow has no interest, under the statute, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons," his interest being a life estate only.
3. **SAME—*Gift by Husband—Without Wife's Consent.*** The rule stated in the decisions in the cases of *Small v. Small*, 56 Kan. 1, 42 Pac. 323, and *Poole v. Poole*, 96 Kan. 84, 150 Pac. 592, regarding the unlimited power of a husband to give away his money or personal property, although the intention or known effect be to deprive his wife of her statutory share should she survive him, followed.
4. **SAME—*"Colorable" Transaction by Husband.*** A colorable transaction is one presenting an appearance which does not correspond with the reality, and in the sense ordinarily contended for, an appearance intended to conceal or to deceive.
5. **SAME.** Deeds of real estate conveying to a married man life estates and to his sons the remainders in fee, considered, and held not to be colorable.
6. **SAME—*Sale of Husband's Land—Proceeds Belong to Husband.*** Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him, unless it be definitely agreed that a specific portion shall belong to her individually.
7. **SAME—*Action by Widow—No Actionable Contract Alleged.*** The petition considered, and held to contain no allegation of a contract whereby, in consideration of the surrender of the wife's marital interest in land sold by her husband, he agreed to invest her with a substituted marital interest in other land.
8. **SAME—*Action by Widow—No Fraud Alleged.*** The petition considered, and held not to charge the husband with perpetrating a fraud on his wife with respect to the surrender of her marital interest in land belonging to him, which he sold.
9. **SAME—*Personal Property of Husband—Rights of Widow.*** Without actual fraud in procuring a wife to join in a conveyance of her hus-

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band's land, giving her a clear right to impound the consideration received by him or to control its use, she cannot pursue the fund.

10. *SAME—Widow May Recover Only Under Statute.* In order to recover under a petition claiming a widow's statutory interest in real estate, the widow must claim under the statute and through her husband.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed April 6, 1918. Affirmed.

*Ralph E. Page*, of Ottawa, and *Curtis M. Oakes*, of Oklahoma City, Okla., for the appellant.

*A. M. Harvey*, and *J. E. Addington*, both of Topeka, for the appellees; *Eugene S. Quinton*, of Topeka, of counsel.

The opinion of the court was delivered by

BURCH, J.: The action was one by a widow to recover her statutory share of lands in which her deceased husband, William F. Osborn, had been interested in his lifetime. She was defeated, and appeals.

It is not necessary to recite the proceedings. All the facts on which the plaintiff relied for recovery were stated in her third amended petition, and it will dispose of the appeal to determine whether or not those facts warranted judgment in her favor.

The defendants, William F. Osborn, jr., John L. Osborn, and Carl H. Osborn, are sons of the deceased, but not of the plaintiff. The sons claim title under separate deeds to different tracts of land, made in 1906 and 1908, by Frank J. Bennett and wife, C. A. Hill and wife, and Charles S. Kidder and wife, to "William F. Osborn, and at his death to his sons." The consideration for these deeds was paid by William F. Osborn from his own funds, and the deeds were recorded soon after delivery. The statute under which the plaintiff claims reads as follows:

"One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executors as her property, in fee simple, upon the death of the husband, if she survives him: *Provided*, That the wife shall not be entitled to any interest,

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under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state. Continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right aforesaid." (Gen. Stat. 1915, § 3831.)

The plaintiff advances the following propositions:

"1. These transactions amount in law to the acquisition by the husband of a legal or equitable interest in real property under the statute (Gen. Stat. 1915, § 3831) and its conveyance to defendants without his wife's signature, leaving her statutory interest therein unimpaired.

"2. The deeds conveyed to the husband the whole title to the land, and the defendants acquired no interest thereunder.

"3. If the transactions should be considered as a mere disposition by the husband of his personal property, under the rule announced in *Small v. Small*, 56 Kan. 1, 42 Pac. 323, it is, nevertheless, a colorable transaction, and fraudulent as to the widow, as her husband's heir.

"4. Upon the facts set forth in the third amended petition the widow would have her interest in this property under the resulting trust doctrine, and other equitable principles."

It will not be practicable to follow the elaborate arguments made in support of the foregoing propositions, and little more will be done than announce the conclusions of the court.

Propositions one and two have no foundation on which to rest. The deeds specify the nature and quantity of estate which William F. Osborn obtained, and there is nothing to qualify or contradict them. The transactions disclosed by the deeds were between grantors and grantees. The whole estate passed from the grantors. Instead of taking an equitable estate, William F. Osborn took a legal estate, and instead of taking the whole estate, he took a life estate. The remainders in fee vested in his sons. The character and extent of the estate which he took was not affected in the slightest degree by the fact that he had a wife who might outlive him. No equities remained to him, because the transactions were fully executed and he received what he desired. The estate which he took did not survive him. He had no interest, legal or equitable, in the remainders. After his death the whole estate in fee simple vested in his sons, and there was nothing to set apart to his widow. The statute refers to legal or equitable estates of the husband which are capable of inheritance, and does not apply to interests in land which are extinguished by his death.

The third proposition has no foundation on which to rest.

The rule announced in *Small v. Small*, 56 Kan. 1, 42 Pac. 323, is this: A married man may give to his children the bulk of his property when the known effect of the gift will be to deprive his widow of the fair share which otherwise would have fallen to her. If, however, the gift consist of real estate in this state, of which the wife has made no conveyance, she will be entitled to her statutory share if she were a resident of the state when the gift was made. Twenty years after the decision in *Small v. Small* was rendered, the rule was again stated in even stronger terms:

"The general rule is that the law has placed no restriction or limitation on the husband's right to make such disposition of his personal property during his lifetime as he may elect." (*Poole v. Poole*, 96 Kan. 84, syl. ¶ 1, 150 Pac. 592.)

What is a colorable transaction? It is one which presents an appearance which does not correspond with the reality, and in the sense contended for, an appearance intended to conceal or to deceive. If William F. Osborn had taken title in the name of his sons, but had in fact retained power to dispose of the land, he would have been the real owner, and not the sons. The outward appearance of the transactions would not have corresponded with their genuine character, and they would have been colorable. Nothing of the kind occurred. The deeds specify the actual interests of the grantees. The sons had no interest in the life estate, and the life tenant had no interest in the remainders. The gift to the sons was the consideration paid for the conveyances to them of the remainders in fee. Form and substance, appearance and reality, corresponded throughout, and the transactions were not colorable in any degree.

The fourth proposition advanced by the plaintiff is without merit. The money used for the purchase of the real estate in question was money derived from the sale of property situated in Burlington, Kan., which William F. Osborn owned. His wife joined in the conveyance of the lands sold. The contingent interest which a wife has in her husband's land is property, and property subject to conveyance. She may join in his deed of such land, or may not, and may exact such consideration for joining as she may desire, or may find satisfaction in enabling her husband to convey an estate free from con-

tingent reduction. Her property, however, is something entirely distinct from and wholly independent of his property, and should she stand on her property right, she must have a definite agreement that a specific portion of the consideration paid for the conveyance belongs to her, or she has no title to that specific money. It belongs to her husband, and he can do with it as he please. Ordinarily a husband having money of his wife in his possession is simply her debtor. Under some circumstances a trust in her favor may be imposed on property purchased by him into which her money may be traced. But unless there be in the husband's hands a definite, provable sum of money which is the individual property of his wife, there is nothing on which to found a trust or other equitable claim.

In support of the third and fourth propositions, it is claimed the transactions culminating in the deeds were intrinsically fraudulent as to the plaintiff. The argument is, the deceased must have entertained an intention to defraud his wife, which he consummated by the deeds, because she was deprived of property she might have received except for the gifts. This contention is fully disposed of by the decisions in the cases of *Small v. Small* and *Poole v. Poole*. An intention to deprive the wife of her marital right by the means adopted is a lawful, and not a fraudulent, intention.

Some extrinsic facts are relied on to show fraud—concealment of the gifts when made and by subsequent statements, the good financial circumstances of the recipients of the gifts, and some others. These subjects are all fully disposed of, either specifically or in principle, by the cases of *Small v. Small* and *Poole v. Poole*.

The action was commenced in December, 1915. After several futile attempts to state a cause of action, the plaintiff finally filed an amended petition in May, 1917, in which she alleged her husband "assured" her if she would join in the deed to the Burlington property he would reinvest the proceeds in real estate in Lawrence and Baldwin, the property thus acquired to "take the place" of the Burlington property, and to be "sole property" of the husband. The plaintiff joined in the deed to the Burlington property "with the said understanding and agreement." The purpose of these vague allegations, charging neither fraudulent representations nor con-

tract, was of course to try to get by a demurrer. The purpose is all the more apparent because the allegations were of communications concerning which the plaintiff was not competent to testify. Motions were made to require the plaintiff to plead according to well understood rules, but the court denied the motions, and disposed of the case on the assumption the plaintiff had cut her garment according to her cloth.

There is no allegation of a definite and enforceable contract, whereby, in consideration of the surrender of the wife's marital interest in the Burlington property, her husband agreed to invest her with a substituted marital interest in other specified land. Such a contract would need to be in writing to be actionable, and the plaintiff does not claim that any such document ever existed.

Giving the pleading its utmost force, it does not charge the husband with perpetrating a fraud on his wife. It indicates a purpose to dispose of real estate situated in a distant county and to invest in other real estate nearer home, which was only partially carried out. The wife concurred, believing it would be fully carried out. Conceding that the effect was to divest the wife of her marital interest in the Burlington property, the obligation, if any, to reinvest in other land was moral, instead of legal. Unless there were actual fraud, giving the wife a clear right to impound the proceeds or to control their use, she cannot pursue them. The substantial claim made in the petition is for a widow's statutory interest in specific tracts of land, a fee-simple title to one-half in value. In order to recover, the plaintiff must claim under the statute and through her husband, and her husband had no interest in the property to which her statutory right could attach.

Some make-weight allegations are inserted in the petition, to the effect that through the joint efforts of husband and wife, incumbrances on the land in controversy were paid off, and valuable, permanent improvements were placed on it. The plaintiff does not ask for compensation, or for a lien. What she wants is one-half the land, something she is not entitled to receive.

The plaintiff presents no tenable theory, legal or equitable, according to which the relief demanded could be awarded, and the court knows of none. Therefore, the judgment of the district court is affirmed.

No. 21,641.

THE STATE OF KANSAS, *Appellee*, v. TOM PERRY, *Appellant*.

## SYLLABUS BY THE COURT.

1. INTOXICATING LIQUORS—*Information—Separate Charges—Plea of Not Guilty—Preliminary Examination—Waiver.* Where a defendant joins issue on several charges set forth in an information by a plea of not guilty, and proceeds to a trial of such charges without raising a question as to the sufficiency of a preliminary examination and that no examination had been held on one of the charges, an objection upon that ground after conviction comes too late.
2. SAME—*Evidence.* The evidence in the case held to be sufficient to sustain the conviction.

Appeal from Cowley district court; OLIVER P. FULLER, judge. Opinion filed April 6, 1918. Affirmed.

W. P. Hackney, and L. D. Moore, both of Winfield, for the appellant.

S. M. Brewster, attorney-general, and J. A. McDermott, county attorney, for the appellee.

The opinion of the court was delivered by

JOHNSTON, C. J.: Tom Perry was arrested upon a complaint charging him with (1) a felonious sale of intoxicating liquor, (2) having intoxicating liquor in his possession, and (3) maintaining a nuisance. A preliminary hearing was had, after which he was bound over to the district court. In the order of the justice of the peace the offenses mentioned for which the defendant was to be held for trial were the unlawful sale and the maintaining of a nuisance, but the offenses were referred to as being those charged in the *second* and *third* counts of the complaint. The information upon which defendant was tried in the district court set forth three counts corresponding to those of the complaint. The defendant went to trial without objection to the information, and joined issue on all the offenses charged, by plea of not guilty. Upon the evidence the jury returned a verdict finding the defendant guilty as charged in the first and second counts of the information; that is, for the unlawful sale and for having intoxicating liquor in his possession.

In his appeal defendant contends that he was convicted of an offense for which he did not have a preliminary examination. There was some confusion in the record of the examining magistrate in that he found that a felonious sale had been committed by defendant as charged in the second count, whereas that charge was contained in the first count. Then he held him for keeping a place for the sale of intoxicating liquors which was charged in the third count, and, as we have seen, the jury found him guilty on the first and second counts, which charged a sale and the keeping of liquors in his possession. Since the magistrate expressly held him for a felonious sale, the error in naming the count containing that charge could not have misled or prejudiced the defendant. Only one sale was alleged, and he was bound over for a sale. He was held for trial on the third count, for keeping a place where liquors were sold, rather than for keeping liquors in his possession, and of the latter offense he was not convicted; but as the liquor which he sold was necessarily in his possession he was probably not surprised to find that count in the information. At any rate he did not file a plea in abatement or question in any way the propriety of charging him with all three offenses. Having joined issue on the offenses set out in the information and of which he was convicted, without raising the objection that he had not been allowed a preliminary examination, he must be held to have waived it. (*The State v. Bowman*, 80 Kan. 473, 103 Pac. 84.) In no event could he have been prejudiced so far as the second count is concerned, since the sentence imposed upon that count runs concurrently with that imposed for the felonious sale, and the penalty was therefore not enlarged by the conviction on the second count.

The remaining objection is that the evidence did not warrant a conviction of any offense. A witness testified, in effect, that she saw the defendant make frequent trips with strangers to a ravine in which there was underbrush near her residence, several times during a certain day, and that in one instance she saw him hand to another a whisky bottle almost full of liquor and exchange it for coin given him by the other. In this place, to which he made frequent trips during the day, accompanied by strangers, a number of whisky bottles were



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found, and quite a number were also found in an outhouse at his residence. While the witness did not taste or smell the contents of the whisky bottle, she was close to the parties and said that she was sure it was whisky that was exchanged for money. Taking the testimony and the surrounding circumstances together they appear to be sufficient to support the verdict.

The judgment is affirmed.

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No. 21,658.

W. J. ROBB, *Plaintiff*, v. FRED W. KNAPP, as State Auditor, etc.,  
*Defendant*.

SYLLABUS BY THE COURT.

CHIROPRACTIC EXAMINERS—*Fees to be Deposited with State Treasurer in His Official Capacity.* Section 10 of chapter 291 of the Laws of 1913 (Gen. Stat. 1915, § 10223) requires the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board.

Original proceeding in mandamus. Opinion filed April 6, 1918. Writ denied.

*R. F. Hayden*, and *A. E. Crane*, both of Topeka, for the plaintiff.

*S. M. Brewster*, attorney-general, *John L. Hunt*, and *S. N. Hawkes*, assistants attorney-general, for the defendant.

The opinion of the court was delivered by

BURCH, J.: The action is one to require the state auditor to issue a warrant for the expenses of a member of the board of chiropractic examiners. The question is whether or not the fund which the warrant would reach is in the hands of the state treasurer as a special depository, or is in his official custody as a state officer. If the fund be a treasury fund, its appropriation by the legislature has lapsed.

The question presented is to be solved by an interpretation of section 10, chapter 291, of the Laws of 1913 (Gen. Stat. 1915, § 10223), which reads as follows:

"(a) All examination fees received by the state board of chiropractic examiners under this act shall be paid to the secretary-treasurer of said

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board, who shall at the end of each year deposit the same with the state treasurer, and the said state treasurer shall place said money so received in a special fund of the state board of chiropractic examiners and shall pay the same out on warrants drawn by the auditor of the state thereof, upon vouchers issued and signed by the president and the secretary-treasurer of said board. Said moneys so received and placed in said fund may be used by the state board of chiropractic examiners in defraying their expenses in carrying out the provisions of this act.

(b) The secretary-treasurer shall keep a true and accurate account of all funds received and all vouchers issued by the board; and on the first day of December of each year he shall file with the governor of the state a report of all receipts and disbursements and the proceedings of said board for the fiscal year. (c) The members of said board shall receive a per diem of ten (\$10) dollars per each day during which they shall be actually engaged in the discharge of their duties, and mileage at the rate of three (3) cents per mile for each mile necessarily traveled in going to and from any meeting of said board. (d) Such per diem and mileage and such other incidental expenses necessarily connected with said board shall be paid out of the fund of the state board of chiropractic examiners and not otherwise."

The plaintiff argues that the state treasurer as an individual was constituted an agent of the board to keep the fund and pay it out under prescribed formalities. The state was to be under no liability for the services and expenses of the board, which was to be supported by the fees which it was authorized to collect. These fees were to be systematically accounted for, were to be kept in a special fund by a custodian designated for the purpose, and were to be available for use whenever needed. The decision in the case of *The State, ex rel., v. Stover*, 47 Kan. 119, 27 Pac. 850, is cited, in which a distinction was drawn between the state treasurer and a person holding the office of state treasurer, as the custodian of public money.

The auditor draws opposite conclusions from the same premises. If the individual who happens to be state treasurer were custodian of the fund, there would be no purpose in designating it a special fund. The only purpose of such designation is to distinguish the fund from other funds in the treasury. The method of drawing upon the fund is the usual method of getting money out of the treasury. Use of the term, state treasurer, in connection with public business indicates a state official rather than a board agent, and the legislature of 1913 frequently used the designation, state treasurer, or treasurer of state, where official capacity and conduct were clearly intended.

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In the case cited by the plaintiff it was said that money in the possession of the person who was treasurer of state was rightfully in his hands as state treasurer, and consequently was rightfully in the state treasury.

The auditor presents a question of public policy. The money is public money received and paid out for public purposes. It ought to be secured by official bond, and handled as funds of like character which are required to go into the treasury. Without clear expression to the contrary, an intention to establish an unusual practice, fraught with danger and subject to abuse, ought not to be imputed to the legislature.

The court agrees with the state auditor, and the writ is denied.

WEST, J.: Not sitting.

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No. 21,692.

THE STATE OF KANSAS, *Appellee*, v. ALBERRY PETERSON, *Appellant*.

## SYLLABUS BY THE COURT.

**CRIMINAL LAW**—*Failure of Wife to Testify—Reference Thereto by County Attorney—When Reversible Error.* In an argument to the jury in a criminal action, it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but before a judgment of conviction will be reversed, it must appear that some substantial right of the defendant was affected by the error.

Appeal from Douglas district court; CHARLES A. SMART, judge. Opinion filed April 6, 1918. Affirmed.

*M. A. Gorrell, Henry H. Asher, Edward T. Riling, and John J. Riling*, all of Lawrence, for the appellant.

*S. M. Brewster*, attorney-general, and *J. B. Wilson*, county attorney, for the appellee.

The opinion of the court was delivered by

MARSHALL, J.: The defendant appeals from a conviction on a charge of robbery. To supply the place of a transcript, the trial court made such a record as is necessary to present the question argued by the defendant. The material parts of that record are as follows:

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"In his opening argument to the jury, Mr. J. B. Wilson, county attorney, made, in substance, the following remarks to the jury:

"He has taken the stand himself and he has brought here his father and mother to testify that he was at home that day. His wife, even, isn't here to testify."

"The attention of the court was called to this remark a few moments after it was made, by one of counsel for defendant who approached the bench and stated in a whisper that he desired the remark made a part of the record. The court stenographer was not in the room at the time the argument in question was made.

"The defense in this case was an alibi. The father and mother of the defendant testified that he was at home for supper and the testimony of two or three other witnesses being that he was in their company or seen by them later in the evening.

"The crime was alleged to have taken place between eight and nine o'clock in the evening, and the defendant was alleged to have been at Linwood, Kan., on a freight train, and to have ridden the same to Lawrence where the alleged crime was testified to have been committed, i. e., that the theft was from the person of a brakeman on said train as it stood on the track at the City. The circumstances of the case were such that the defendant could not have been at home for supper, at the time he claimed to have eaten supper, and at Linwood."

The defendant complains of the conduct of the county attorney, and asks that the judgment be reversed and that a new trial be granted. Section 215 of the code of criminal procedure, in part, reads:

"That no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination: *And further provided*, That the neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." (Gen. Stat. 1915, § 8130.)

It has been held error for the county attorney to refer to the fact that the defendant did not testify. (*The State v. Balch*, 31 Kan. 465, 2 Pac. 609; *City of Topeka v. Myers*, 34 Kan. 500, 8 Pac. 726; *The State v. Tennison*, 42 Kan. 330, 22 Pac. 429.)

By the same reasoning and under the same statute and decisions, it must be, and is, held error for the county attorney to refer to the fact that the defendant's wife did not testify.

Section 293 of the code of criminal procedure must be read in connection with section 215. Section 293 reads:

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." (Gen. Stat. 1915, § 8215.)

Under this statute it has been repeatedly held that to cause a reversal of a judgment in a criminal action, the error committed must affect a substantial right of the defendant. In *The State v. Brooks*, 74 Kan. 175, 85 Pac. 1013, this court said:

"To justify a reviewing court in ordering a new trial in a criminal case because of the infraction of the statutory rule that the omission of the defendant to testify shall not be considered by the jury, it must conclusively appear that the jury or some one of them in arriving at a verdict gave weight to the fact that the defendant did not take the stand in his own behalf, as a circumstance tending to establish his guilt." (syl. ¶ 2.)

This rule was followed in *The State v. Dreiling*, 95 Kan. 241, 147 Pac. 1108. In *The State v. Fleeman*, 102 Kan. 670, 171 Pac. 618, this court said:

"The code of criminal procedure was framed to supersede the common law with a more rational system. While it is defective in many respects, and in many others exhibits a conservatism which contrasts strongly with its general liberality, it is distinctively modern. The tradition of the common law, however, was so strong that it came near superseding the code. In time the code was rediscovered, and it is the purpose of the court to interpret and apply it according to its true intent and spirit." (p. 677.)

Under all the circumstances, it is highly improbable that the verdict of the jury was influenced by the remark of the county attorney. It does not appear that the jury was so influenced and, therefore, the judgment will not be reversed.

*The State v. Balch*, 31 Kan. 465, 2 Pac. 609; *City of Topeka v. Myers*, 34 Kan. 500, 8 Pac. 726; *The State v. Tennison*, 42 Kan. 330, 22 Pac. 429, are overruled in so far as they hold that a judgment of conviction must be reversed—notwithstanding that the error does not prejudicially affect any substantial right of the defendant—for a mere reference by the county attorney to the fact that the defendant has not testified.

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4. **Alienation of Affections—Insufficient Evidence against Father-in-law.** A father-in-law is not guilty of alienating his infant son's affections for his wife merely because he sends him to school after the wife has refused to live with him on account of non-support, and when in good faith the father sought to improve the son's earning capacity. *Cooper v. Cooper*..... 378
5. **Amount Involved Less than \$100—Appeal Dismissed.** The district court having jurisdiction of the cause and the amount being less than \$100, the appeal is dismissed. *Ridgway v. Wetterhold* ..... 217
6. **Appeal—Amount Involved Less than \$100—Appeal Dismissed.** Where in an action for the recovery of money only, the amount in controversy on appeal is less than \$100 this court has no jurisdiction and the appeal is dismissed. *Wayman v. Soller*, 661
7. **Appeal—No Transcript of Evidence—Scope of Review.** Failure to provide a transcript of the evidence does not necessarily require the dismissal of an appeal. It merely excludes from the scope of the review those features of the lawsuit dependent thereon. *Lasnier v. Martin*..... 551
8. **Application for Continuance—Bad Faith.** The evidence supported the finding of the court that the application for a continuance on account of defendant's sickness was not made in good faith and a new trial was properly refused. *Ladd v. Flato* ..... 312
9. **Arbitration—Partiality of Arbitrator—Decision Not Binding.** The decision of an arbitrator who fails to understand his functions and duties and who acts as agent of one of the parties is not binding however honest his motives may be. *Contracting Co. v. Railway Co.*..... 799
10. **Arbitration—Report of Referee—Motion—Appeal.** The defendant having filed a motion within three days after the decision of the referee, which motion was overruled less than six months before the appeal was taken, is entitled to a review of the rulings mentioned in that motion. *Id.*..... 799
11. **Arson—Expression Used by Defendant—Inferences for Jury.** No error is committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used, when the situation is such that all the data from which an inference on the subject might be drawn could readily be made available to the jury. *The State v. Heitman* ..... 693
12. **Arson—Instructions—Burden of Proof—Presumptions.** On a trial for arson the instructions as a whole showed explicitly that the burden of proof was on the state, that it did not shift, and that the defendant was presumed to be innocent until the contrary was proven. *Id.*..... 693

## APPEAL AND ERROR—CONTINUED:

13. **Automobile—Collision—Verdict—Judgment.** In an action for damages arising from a collision of automobiles a verdict and judgment supported by substantial though conflicting evidence will not be disturbed. *Biernacki v. Ratzlaff*..... 573
14. ——— Evidence examined and held sufficient to support a verdict and judgment for damages arising from a collision of automobiles on the public highway. *Id.*..... 573
15. **Automobile—Negligence of Driver—No Imputed Negligence to Minor Son.** The negligence of a father in driving an automobile across a railroad track without stopping, looking or listening, cannot be imputed to his ten-year-old son who is riding with him. *Burzio v. Railway Co.*..... 287
16. **Automobile—Personal Injuries—No Error in Record.** Various assignments of error relating to evidence, instructions, special findings, and the general verdict, considered and held none of them is sufficient to warrant a reversal. *Cusick v. Miller*..... 663
17. **Bank as Loan Agent — Taking Worthless Securities — Fraud.** The record justified the conclusion that the defendant bank acted as the agent of the plaintiff in loaning the money sued for herein. *Allen v. Bank*..... 592
18. ——— The petition set forth conduct clearly fraudulent without using that particular adjective. Held, that it was proper to instruct on the fraud thus alleged. *Id.*..... 592
19. ——— The evidence tended to show that the bank profited by the transaction. *Id.*..... 592
20. **Benefit Insurance—Jury in Advisory Capacity Only—Effect of Improper Evidence.** Where a jury is called in an advisory capacity only a judgment will not be reversed for admission of incompetent evidence unless it appears that the improper evidence affected the result. *Sipe v. Sipe*..... 742
21. **Bridge—Defective Guard Rails — Injuries — Evidence — Findings.** In an action against a township for injuries caused by a defective guard rail on a township bridge, the evidence supported the findings of the jury, and judgment against the township cannot be disturbed. *Holcomb v. Clifton Township*..... 44
22. **Building Tunnel — Engineer's Final Estimate — Objections Thereto.** Where a contract for building a tunnel provided that objections to the estimate of the railroad engineer should be presented within ten days after being made, the conduct of the engineer excused the contractor from filing his objections within the ten-day period. *Contracting Co. v. Railway Co.*.... 799
23. **Condemnation Proceedings — Award of Damages — Appeal Bond.** Where landowners attempted to appeal from the award of damages in condemnation proceedings by a school district and the appeal bond, though insufficient, was not void, and a good and sufficient appeal bond was tendered it was error for the court to refuse the tender and dismiss the appeal. *Wood v. School District*..... 78
24. **Condemnation Proceedings — Warrant for Damages — Ownership—Arbitration—Estoppel.** Where a grantor to whom a county warrant for road damages was issued voluntarily submitted to the county commissioners a question at issue he is estopped from questioning the award of such arbitrators thus selected. *Lillard v. Johnson County*..... 822
25. **Contract by Telegram—Sale of Melons—Evidence for Jury.** Under the facts disclosed by the plaintiff's evidence, and stated

## APPEAL AND ERROR—CONTINUED:

- in the opinion, it was not error for the court to overrule a demurrer to that evidence. *Bruce v. Hayes*..... 115
26. **Contract by Telegram—Sale of Melons—Instruction Not Prejudicial.** As against a defendant there is no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify the instruction. *Id.*, 115
27. **Contract—To Make Minor an Heir—Insufficient Evidence.** In an action to compel specific performance of a contract to leave all defendant's property to plaintiff the evidence did not prove the contract alleged in plaintiff's petition. *McKeown v. Carroll* ..... 826
28. ——— The findings of fact made by the trial court were supported by the evidence, and no sufficient reason is advanced by the plaintiff for striking out any portion of any finding or for adding anything thereto. *Id.*..... 826
29. **Conversion of Wheat—Demurrer to Evidence Sustained—Error.** The rule is that a demurrer to plaintiff's evidence should not be sustained unless there is an entire absence of proof tending to show a right to recover. *Mentze v. Rice*.. 855
30. ——— A demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove. *Id.*..... 855
31. **Creditor's Bill—Demurrer to Evidence—Wrongfully Sustained.** In a suit in the nature of a creditor's bill it was error for the court to sustain a demurrer to the evidence. *Kinkel v. Chase*, 275
32. **Criminal Law—Failure of Wife to Testify—Reference thereto by County Attorney.** In a criminal action, it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but, to require a reversal, it must appear that some substantial right of the defendant was affected by the error. *The State v. Peterson*..... 900
33. **Damages—Obstructing Access to City Lots—Findings—Instructions.** In an action for damages for obstructing ingress to and egress from city property certain errors in admitting proof of damages not alleged, and in submitting improper special questions to the jury, are held not to have been prejudicially erroneous. *Griffith v. Railway Co.*..... 23
34. **Demurrer to Evidence Sustained—Time for Appeal.** To review a ruling of the court sustaining a demurrer to plaintiff's evidence and giving judgment for the defendant it is necessary that the appeal be taken within six months after the ruling is made, and the filing of a motion for a new trial does not operate to extend the time of such appeal. *Sheahan v. Kansas City* ..... 252
35. **Discretion of Court—Orders Appealable.** Overruling a motion to require different causes of action to be separately stated and numbered being a matter of discretion is generally not reviewable. *Mullarky v. Manker*..... 92
36. **Error Favorable to Defendant—No Error as to Him.** As against a defendant, there was no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify the instruction. *Bruce v. Hayes*, 115
37. **Evidence—Not Reviewable.** Where defendant did not ask to have a question to plaintiff made more specific, and did not in any way attack the answer, nothing was preserved for review as to its admission. *Mullarky v. Manker*..... 92

## APPEAL AND ERROR—CONTINUED:

38. **Evidence—Train Records—Weight of Evidence.** Although the train sheets and records of a railway show that no engine was operated at or near the place where the fire occurred, neither this court nor the trial court can weigh such evidence against evidence of other witnesses who testified that they saw an engine operating there at that time. *Smith v. Railway Co.*, 150
39. **Exchange of Property—Evidence for Jury.** The evidence in support of the counterclaim examined, and held sufficient to warrant its submission to the jury. *McKenna v. Morgan*.. 478
40. **Exchange of Property — Fraud — Pleadings — Rulings on Motions Not Prejudicial.** The overruling of a motion to require different causes of action to be separately stated and numbered, being a matter of discretion, is ordinarily not subject to review. *Mullarky v. Manker*..... 92
41. ——— Where a demurrer to a petition on the ground of misjoinder is based upon the claim that one of the defendants is not affected by one of the causes of action, the sustaining of a demurrer to the evidence as to that defendant prevents the overruling of the demurrer on that ground from being material on appeal. *Id.*..... 92
42. ——— The overruling of a motion to strike matter from a petition held not to have been prejudicial. *Id.*..... 92
43. **Farm Tractor—Agency of Salesman Established.** The evidence is held sufficient to prove that the vendor of a farm tractor was the plaintiff's agent, and that the agent received from the purchaser the price of the machine. *Downs v. Rogers*..... 797
44. **Foreclosure—Error in Judgment—Error Corrected on Appeal.** Where a judgment of foreclosure was erroneous but not void and the sale was confirmed, the defendants were bound by the judgment and they could take advantage of the error only by appeal. *Marsh v. Votaw*..... 747
45. **Foreclosure — Sale — Confirmation — Motion to Set Aside — Laches.** Where the original judgment of foreclosure was erroneous but not void, and three years after the sale and confirmation defendants filed a motion to set aside the confirmation, and that they be allowed to redeem, the application was made too late to entitle them to relief. *Id.*..... 747
46. **Foreclosure Sale — Confirmation Set Aside — Redemption Allowed.** In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, held, on the facts stated in the opinion it was error to deny the relief prayed for. *Norris v. Evans*..... 583
47. **Former Appeal—Demand—Instruction.** Language in an instruction defining the character of the action held to have been in accordance with the decision of the supreme court on a former appeal. *McCue v. Hope*..... 390
48. **Hail Insurance—Incompetent Evidence of Amount of Loss.** In an action for loss under a hail insurance contract the admission of evidence of amounts paid by the insurance company to other persons in settlement of losses to wheat crops occasioned by the same hailstorm was error. *Williams v. Insurance Co.*..... 74
49. **Harmless Error — Admission of Evidence.** The admission of evidence offered by defendant upon an issue not raised by the answer, was not ground of reversal where plaintiff suffered no actual prejudice, not being deprived of a full opportunity to meet the defendant's claims. *McCue v. Hope*..... 390

## APPEAL AND ERROR—CONTINUED:

50. **Harmless Error—Amendment of Pleading—False Arrest.** Where a petition in an action for damages for false arrest alleged that by reason thereof plaintiff's business declined and was damaged in the sum of \$1,000, it was not reversible error to require him to allege specifically and in detail how he was damaged. *Smith v. Hern*..... 373
51. **Harmless Error—Exclusion of Evidence.** In an action on a bond to quiet title, exclusion of evidence of the value of land deeded in consideration of a bond, was not reversible error. *Snodgrass v. Snodgrass* ..... 281
52. **Harmless Error—Treating Bond to Quiet Title as Having Been Reformed.** In a suit on bond to quiet title where no reformation of the bond was sought or ordered, defendants were not harmed because the trial court treated the bond as reformed, so that the description of land would correspond to the defendant's quitclaim deed. *Snodgrass v. Snodgrass*.... 281
53. **Hypothetical Question—No Objection in Trial Court.** A party may not complain of a ruling on an objection to a hypothetical question as to the value of legal services, which was not made when the evidence was offered. *Epp v. Hinton*..... 435
54. **Injunction—Restraining Enforcement of Mandate of Supreme Court.** A defeated appellant applied to the district court in vain for an injunction to restrain the enforcement of the mandate of the supreme court. Upon appeal his application is found to be without semblance of merit and it is dismissed. *Forbes v. Madden* ..... 46
55. ——— If there had been any merit in the application the district court was without power to enjoin or restrain judgments and orders of the supreme court. *Id.*..... 46
56. **Injuries—Railroad Crossing—Findings—Instructions.** Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms, state facts and not conclusions of law. *Burzio v. Railway Co.*..... 287
57. **Island Lands—Findings—New Trial Granted—No Error.** Where numerous findings were made by a jury, and upon the whole record it appears that a new trial was ordered because the trial judge disagreed with the jury on the facts, the order granting a new trial is not reviewable. *Warner v. Snook*.... 814
58. ——— Although the trial court did not set aside the findings of the jury, yet unless it appears from the record that the court approved such findings, this court on appeal from an order granting a new trial will not order judgment on such findings. *Id.* ..... 814
59. **Joint Defendants—Separate Defenses—Presentation in Trial Court.** In a suit against several defendants on a contract of employment one defendant having a different defense from the others should present it by request for special instruction, or by demurrer to the evidence, or in some way call the court's attention thereto. *Drysdale v. Wetz* ..... 422
60. **Judgment—Illegal City Court—Appeal—Jurisdiction of District Court.** Where a statute creating a city court was unconstitutional, and on appeal to the district court the case was tried on its merits, without objection by either party, it is too late after judgment to question the jurisdiction of the district court on the ground of the illegality of such city court. *Neal v. Kent* ..... 239

APPEAL AND ERROR—CONTINUED:

61. **Judgment on Creditor's Bill—Only Parties Affected Thereby.** A judgment against the defendant in a suit in the nature of a creditor's bill will not inure to the benefit of another creditor of defendant who is neither party nor privy to the judgment. *Kinkel v. Chase* ..... 275
62. **Malicious Prosecution—Conviction in Police Court—Probable Cause Shown.** The third count in the petition is held to state no cause of action because it shows that the prosecution of plaintiff resulted in his conviction, notwithstanding his appeal and acquittal in the district court, the conviction in the police court is conclusive of probable cause. *Smith v. Parman*..... 787
63. **Malicious Prosecution—Statute of Limitations.** In an action for malicious prosecution the causes of action set forth in the first and second counts of the petition held barred by the statute of limitations. *Id.*..... 787
64. **Mob Violence—Death While Resisting Arrest—Good Faith of Officers Question for Jury.** In an action for damages for a death while deceased was resisting arrest by a marshal's posse, the question of the good faith of the city officers, or whether the posse constituted a mob under the statute, were questions for the jury. *Harvey v. City of Bonner Springs*..... 9
65. ——— Under the facts stated in the opinion and under the evidence a verdict for the plaintiff against the city for \$8,500 will not be disturbed. *Id.*..... 9
66. **Moving Pictures—Censorship—Petition to Court for Review—Defective Allegations.** In the absence of allegations or proof that the board of review acted arbitrarily or dishonestly it must be presumed that it acted in good faith, and that its determination was an honest exercise of its best judgment. *Photoplay Corporation v. Board of Review*..... 356
67. **Moving Pictures—Censorship—When Decision of Board of Review is Conclusive.** Where the state board of review of moving-picture films has determined that certain films are immoral and not proper for exhibition its determination is not open to review by the courts unless its action is fraudulent, arbitrary or in excess of its authority. *Id.*..... 356
68. ——— The redress for an aggrieved party provided for in section 15 of the act is not a reëxamination of the picture by the court, nor the exercise of an administrative and non-prejudicial power, but is such redress as a court can give. *Id.*, 356
69. **Negligence—Railroad Crossing—Obstruction to View.** Liability of a railroad company for injuries in collision between an automobile and a railroad car may be founded on negligence in allowing weeds, grass and brush to grow so as to obstruct the vision of those approaching the railroad crossing. *Burzio v. Railway Co.*..... 287
70. **Negligence—Street-car Track—Buggy Overturned—Death—Findings.** In an action for damages for the death of a driver of a buggy occasioned by a street-car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.* ..... 214
71. **Negligence—Trial—No Prejudicial Error in Record.** The record, in an action to recover damages for personal injuries sustained through the negligent maintenance of a telephone wire across a public highway examined, and no prejudicial error discerned therein. *Walmsley v. Telephone Association*, 139



## APPEAL AND ERROR—CONTINUED:

72. **Negligence—Verdict—Findings—Interpretation.** The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Railway Co.* ..... 287
73. **New Trial—Cumulative Evidence—Insufficient.** The production of cumulative evidence in support of a motion for a new trial is addressed to the sound discretion of the trial court, and does not require the granting of a new trial as a strict matter of right. *Biernacki v. Ratzlaff* ..... 573
74. **New Trial—Properly Granted.** The proceedings considered, and held, the court did not abuse its discretion in granting a new trial. *Decker v. Bailey* ..... 538
75. **Note and Mortgage—Date when Due Changed—Evidence—Findings.** The transcript has been examined and found to contain evidence to afford firm support for the findings and conclusions of the trial court. *Willhite v. Mason* ..... 461
76. **Note and Mortgage—Foreclosure—Defense of Payment.** In an action to foreclose a mortgage where the defense was payment, the evidence abstracted was sufficient to sustain the judgment for defendant. *Kurt v. Shupe* ..... 426
77. **Note—Relationship of Parties—Presumption of Fraud.** Failure of consideration and fraudulent purpose in the giving of a note and chattel mortgage, will not be presumed because of the relationship of the parties. *Grisier v. Bank* ..... 7
78. **Pleadings—Demurrer.** Parts of an answer to a petition in an action in replevin examined and no prejudice disclosed in overruling a demurrer thereto. *Implement Co. v. Willhite*... 56
79. **Quo Warranto—Issues Settled by Stipulation—Appeal Dismissed.** An appeal may be dismissed when it appears that all the orders from which the appeal is taken were made under a stipulation signed by the party appealing. *The State v. Gas Co.* ..... 712
80. ——— An appeal may be dismissed when this court cannot make any order that will affect the rights of the parties thereto. *Id.* ..... 712
81. **Quo Warranto—Natural Gas Companies—Action Dismissed—Appeal Too Late.** When an action is dismissed as to certain defendants, all orders which were made prior to the order of dismissal, and of which complaint is made by those defendants, must be appealed from within six months after the order of dismissal is made. *Id.* ..... 712
82. **Ratification—Conflicting Evidence—Findings and Conclusions.** A conflict in the evidence upon an issue must be settled by the triers of the facts, and not on appeal. *Willhite v. Mason*.... 461
83. **Rejected Evidence—Nonprejudicial.** Rejected evidence held not to have been of sufficient importance to warrant a reversal, assuming that it should have been admitted. *Stahl v. Stevenson* ..... 447
84. **Report of Referee—Motion—Appeal.** The defendant having filed a motion within three days after the decision of the referee, which motion was overruled less than six months before the appeal was taken is entitled to a review of the rulings mentioned in that motion. *Contracting Co. v. Railway Co.* ..... 799
85. **Report of Referee—New Trial Denied—No Appeal—Judgment.** Where judgment was rendered upon the findings of

APPEAL AND ERROR—CONTINUED:

- fact and conclusions of law in a referee's report, and grounds for a new trial were not presented in time, and no appeal taken from an order denying a new trial the judgment will be affirmed. *Bank v. Bank*..... 412
86. Review—Judgment—Evidence. Where there is some evidence to sustain a judgment against all defendants in an action on a contract of employment alleged to have been made with all of them, the judgment should be affirmed. *Drysdale v. Wetz*, 422
87. Reward—Apprehending Criminal—Trial—Evidence. There was no material inconsistency in the findings of the jury. *Smith v. Fenner*..... 830
88. ——— The evidence was held sufficient to support the finding, verdict and judgment that plaintiff had earned the reward offered by defendant. *Id.*..... 830
89. Sale of Jack—Breach of Warranty—No Error in Record. Errors assigned on instructions, incompetency of evidence, and its insufficiency to sustain a verdict, examined and not sustained. *Eagan v. Murray*..... 193
90. Sale of Mechanical Milker—Damages—Findings. In an action for the purchase price of a milk separator, and mechanical milker, the findings of damages in favor of defendant from defects in the articles were not inconsistent nor unsupported by evidence. *Cream Separator Co. v. Abbott*..... 265
91. Statute of Frauds—Oral Promise to Devise Land. In an action by a granddaughter of the insured against beneficiaries under the will to recover one third of estate under insured's promise to devise, rejection of evidence, even if admissible, did not warrant a reversal. *Stahl v. Stevenson*..... 844
92. Striking Allegations of Petition. In an action for fraud the overruling of a motion to strike alleged redundant or irrelevant matter from the petition held not prejudicial where recovery was had upon a single item and on the basis of its agreed amount. *Mullarky v. Manker*..... 92
93. Sufficiency of Evidence—Granting of New Trial. In an action against a city for personal injuries the question of the sufficiency of the evidence, while not presented by a motion for a new trial, held to be involved in the court's grant of a new trial because of special findings. *Weaver v. City of Cherryvale* ..... 475
94. Surface Water—Drainage—Findings. Where there is room for difference of opinion in the determination of an ultimate and controlling fact, the opinion and judgment of the trial court thereon is conclusive on appeal. *Evans v. Diehl*..... 728
95. Trial—Instructions. If instructions, when considered together, do not appear to be erroneous a judgment based thereon will not be reversed. *Zuspann v. Roy*..... 188

APPEAL BONDS—See BONDS, 2-4, 12.

APPROPRIATIONS:

1. Enactment of Statute—Appropriation of Money by "Concurrent Resolution." Where a "house concurrent resolution" purporting to appropriate public money passed both houses, was approved by the governor, and in all respects received the same treatment as a regularly enacted bill, it will be regarded as a valid appropriation statute. *The State, ex rel., v. Knapp* ..... 701

## ARBITRATION:

1. **Condemnation Proceedings—Warrant for Damages—Ownership—Arbitration—Estoppel.** Where a grantor to whom a county warrant for road damages was issued voluntarily submitted to the county commissioners a question at issue he is estopped from questioning the award of such arbitrators thus selected. *Lillard v. Johnson County*..... 822
2. **Partiality of Arbitrator—Decision Not Binding.** An arbitrator is the agent of both parties concerned, and where he misconceives the functions of his agency and proceeds on the theory that he is the special agent of one of them, his decision is not binding, however honest his motives may have been. *Contracting Co. v. Railway Co.*..... 799

ARREST—See FALSE ARREST, 1, 2.

## ASSAULT:

1. **Assault—Conspiracy—Instructions.** An instruction is not to be condemned by separating from its context language in one part of it and ignoring the instruction as a whole. *Drysdale v. Wetz* ..... 680
2. ——— Objections to certain instructions examined and held to be without merit, the abstract making no reference to the other instructions given. *Id.*..... 680
3. **Assault—Conspiracy—Order of Proof—Judicial Discretion.** In an action for damages resulting from a conspiracy to assault, there was no prejudicial error in the admission of declarations made by one of the conspirators before proof of the conspiracy, where subsequent evidence sufficiently established the conspiracy alleged. *Id.*..... 680
4. **Detective Agent—Assaulting Suspected Criminal—Extorting Confession.** Where a detective agency authorized its representative to obtain a confession from a suspect, and in executing that authority an unlawful assault and battery is committed upon the suspect, the detective agency is liable for the damages resulting from the unlawful assault. *Mansfield v. Detective Agency* ..... 687
5. **Malicious Assault—Instructions—"Smart Money"—Damages—Suffering.** The instructions given, none being requested by the defendant, sufficiently covered the issues between the parties and fairly stated the law. *Townsend v. Seefeld*..... 302
6. ——— The findings, in accordance with the evidence of the plaintiff, convicted the defendant of such malicious and oppressive conduct as justly to render him liable to the imposition of smart money. *Id.*..... 302
7. ——— The allowance of actual damages was properly based on physical and mental suffering caused by the defendant's conduct, and not alone on nervous shock. *Id.*..... 302
8. **Malicious Assault—Punitive Damages—Financial Condition of Defendant.** It was proper to inquire into the financial condition of the defendant to the end that the finding as to punitive damages might be intelligently made. *Id.*..... 302
9. **Measure of Damages—Mental Suffering.** Where a constable making a forcible and malicious levy inflicted no wound or bruise upon plaintiff, but his conduct resulted in a miscarriage accompanied with severe pain, such result could not be classed as mental as distinguished from physical suffering. *Id.* ..... 302

**ASSAULT—CONTINUED:**

10. **Tortious Act of Servant—Liability of Principal.** A master is responsible for the tortious acts of his servant where such acts are incidental to, and done in furtherance of the business of the master, even if such acts are done willfully or in excess of the authority conferred. *Mansfield v. Detective Agency...* 687

**ASSIGNMENTS:**

1. **Compensation Act—Assignment of Judgment.** The question whether an injured workman may assign a judgment under the workmen's compensation act to a trustee for the benefit of his children considered, but not determined. *Monson v. Battelle* ..... 208
2. **Compensation Act—Judgment—Death of Employee—Revivor.** A lump-sum judgment in favor of a workman under the workmen's compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of the administrator. *Id.*..... 208
3. **School Warrants—Assignment—Rights of Assignee.** By the assignment of a school warrant the assignee becomes the owner of whatever claim the original holder had against the district for indebtedness evidenced by the warrant. *Bank v. School District* ..... 98

**ASSUMPTION OF RISK—See FEDERAL EMPLOYER'S LIABILITY ACT, 1.**

**ATTACHMENT AND GARNISHMENT:**

1. **Attachment—Bill of Sale—Not Fraudulent.** Where a debtor while solvent gave her note to attorneys to defend her sons in criminal actions pending against them, and gave a bill of sale of personal property to a third party to procure additional security for the payment of such fees, the bill of sale was not fraudulent as to creditors. *Bank v. Greene*..... 202
2. **Attachment—Bill of Sale—Security for Future Advances—Not Fraudulent.** When a bill of sale was given to secure a debt and for indefinite future outlays of money for the support of the debtor until her finances mended, the inclusion of future advances did not, of necessity, render the bill of sale fraudulent. *Id.* ..... 202
3. **Attachment—Bill of Sale—To Secure Attorney's Fees—Good Faith.** Where attorneys are employed to represent accused persons in specified criminal actions then pending they can take and hold security for their fees given in good faith and not as a ruse to hinder, delay or defraud creditors. *Id.*..... 202
4. **Attachment—Land—Defective Sheriff's Return—Return Not Void.** Where a sheriff in his return on an order of attachment described the land seized as "the northeast and northwest quarters of section 22 in township 7, range 38" the return was not void for indefiniteness or uncertainty. *Hodgen v. Roy*, 197
5. **Attachment—Mortgage Foreclosure—Concurrent Remedies.** A plaintiff in an action to foreclose a mortgage given to secure payment of an indebtedness may secure the issuance of an order of attachment and the levy of the same upon property other than that included in the mortgage. *Id.*..... 197
6. ——— The mere fact that plaintiff asks for a foreclosure of his mortgage does not preclude the use of other concurrent and consistent remedies. *Id.*..... 197
7. **Attachment—Mortgage Foreclosure—Excessive Levy—Attachment Not Void.** Where there is an excessive levy under

## ATTACHMENT AND GARNISHMENT—CONTINUED:

an order of attachment and the seizure and holding of more property than is necessary to meet a probable judgment the mere fact than an excessive amount of property is seized and held does not necessarily invalidate the attachment. *Id.*.... 197

8. Oil and Gas Company Lease—Forfeiture—Garnishment of Assets—Rights of Creditors. Where an oil and gas company began drilling a well on leased premises and then abandoned the lease, leaving their drilling outfit on the leased premises, such drilling outfit became subject to garnishment in the hands of the lessor by the company's creditors. *Hardware Co. v. Oil & Gas Co.*..... 144

## ATTORNEY AND CLIENT:

1. Attorney's Lien—Application for Allowance—Affidavits—Cross-examination of Affiants. An application for the distribution of a fund against which several attorneys' liens are claimed is a motion, and the code permits the use of affidavits at the hearing thereof. *Ricardo v. Coal & Coke Co.*..... 170
2. ——— An attorney whose claim of lien is denied because the court is convinced that he has performed no services entitling him thereto has no standing to complain of the refusal to allow him to cross-examine the makers of affidavits used in behalf of other claimants. *Id.*..... 170
3. Attorney's Lien—Elements of Value of Legal Services. Among the elements entering into the value of legal services are the character and importance of the litigation, the labor involved, the expenses incurred, the results obtained and, where such is the agreement, the success achieved. *Epp v. Hinton.*..... 435
4. Attorney's Lien—Enforcement—No Pleadings—No Jury. An application to enforce a lien of attorneys upon the proceeds of a judgment obtained by their services may be made in the case wherein the judgment was rendered, without formal pleadings, as is provided in section 485 of the General Statutes of 1915. *Id.*..... 435
5. ——— Being a special statutory proceeding of an equitable nature neither party is entitled to a trial by jury as a matter of right. *Id.*..... 435
6. Attorney's Lien—Value of Services—Expert Evidence—Personal Knowledge of Court. In determining the value of legal services performed by an attorney the court itself is an expert as to the value of such services when performed in his court and in addition to other evidence may apply his own knowledge and professional experience in determining their value. *Id.*..... 435
7. Attorney's Lien—Value of Services—Hypothetical Questions. A party may not complain of a ruling on an objection to a hypothetical question as to the value of legal services, which was not made when the evidence was offered. *Id.*..... 435

ATTORNEY'S LIEN—See ATTORNEY AND CLIENT, 3-7.

## AUTOMOBILES:

1. Auto Crossing Railroad—Obstruction to View—Duty of Driver—Contributory Negligence. Where an auto driver is about to cross a railroad track at a place where his view is obstructed, it is his duty, before driving upon the track, to stop, look and listen, or otherwise assure himself of the fact that he can cross in safety. *Williams v. Electric Railroad Co.*..... 268
2. ——— An auto driver who attempted to cross a railway track where his view was obstructed, without stopping and ascer-

**AUTOMOBILES—CONTINUED:**

- taining whether he could cross in safety, was guilty of contributory negligence, barring recovery for damages from a collision. *Id.* ..... 268
3. **Auto Crossing Railroad—Trolley Car Violating Speed Ordinance—Negligence.** To subject the owner of a trolley car to liability for the violation of a city speed ordinance in a damage suit by a private litigant, it must appear that the disobedience of the ordinance caused or aggravated the damages. *Id.* ..... 268
4. **Automobile—Collision—Verdict—Judgment.** In an action for damages arising from a collision of automobiles, a verdict and judgment supported by substantial, though conflicting, evidence will not be disturbed. *Biernacki v. Ratzlaff* ..... 573
5. ——— Evidence examined and held sufficient to support a verdict and judgment for damages arising from a collision of automobiles on the public highway. *Id.* ..... 573
6. **Automobile—Collision with Street Car—Proximate Cause.** Where the proximate cause of a collision between a street car and an automobile was the unlawful speed at which the automobile was being driven, the plaintiff, who was an occupant, but not the driver, of the automobile, was guilty of contributory negligence. *Fair v. Traction Co.* ..... 611
7. **Automobile—Owned in Partnership—Injury to Third Party—Liability of Partners.** Where a father and son owned an automobile in partnership, and the son while driving the car and engaged in his own separate business injured a third party, the father, who was not present, was not liable for the injuries. *Knight v. Cossitt* ..... 764
8. **Automobile—Personal Injuries—No Error in Record.** Various assignments of error relating to evidence, instructions, special findings, and the general verdict, considered and held, none of them is sufficient to warrant a reversal. *Cusick v. Miller* ..... 663
9. **Automobile Races—Injury to Boy—Contributory Negligence.** Whether a boy ten years old, of average intelligence, while attending automobile races, and who occupies a dangerous place after repeated warnings of danger, is guilty of such contributory negligence as will bar his recovery for injuries received is a question for the jury. *Scott v. Fair Association*, 653
10. **Automobile—Running Down Pedestrian—Contributory Negligence.** A pedestrian arriving at a street intersection which he desires and attempts to cross is not necessarily guilty of contributory negligence because he does not look behind him for approaching automobiles. *Cusick v. Miller* ..... 663

**B.****BAILMENTS:**

1. **Sale by Bailee—Damages.** Although the owner of goods in the hands of a bailee denies ownership, if the holder wrongfully sells them the measure of his liability for conversion is their value at the time of sale, although a demand for them is not made until later. *Tire Co. v. Kirk* ..... 418

**BANKRUPTCY:**

1. **Bankruptcy—Discharge as Affecting Chattel-mortgaged Property.** A discharge in bankruptcy releases a bankrupt from all his debts which are provable in bankruptcy except such as are exempted by the bankruptcy act. *Bank v. Hoffman* ..... 465

**BANKRUPTCY—CONTINUED:**

2. ——— Where a debt secured by chattel mortgage was presented and allowed against the bankrupt's estate, and the mortgaged property not exempt sold to satisfy the debt, the discharge of the bankrupt released all the unsold mortgaged property which was exempt from the lien of the chattel mortgage. *Id.* ..... 465
3. Discharge as Affecting Co-debtor. A discharge in bankruptcy does not release a co-debtor with, or surety for, the bankrupt from liability on a debt, unless that debt has been paid. *Id.*... 465

**BANKS AND BANKING.**

1. Banking—Dishonored Sight Draft—Relation of Bank and Depositor—Parol Evidence. Parol evidence is competent in an action by a bank against the depositor for the amount of a dishonored sight draft to show the relationship of the parties and the nature and conditions of the deposit. *Bank v. Schaefer* ..... 868
2. Banking—Liability of Depositor of Dishonored Sight Draft. Where a depositor is given credit by a bank for the amount of a sight draft deposited for collection and such draft is dishonored the depositor is liable to the bank for the amount of such dishonored draft. *Id.*..... 868
3. Bank as Loan Agent—Taking Worthless Securities—Fraud. The record justified the conclusion that the defendant bank acted as the agent of the plaintiff in loaning the money sued for herein. *Allen v. Bank*..... 592
4. ——— The petition set forth conduct clearly fraudulent without using that particular adjective. Held, that it was proper to instruct on the fraud thus alleged. *Id.*..... 592
5. ——— The evidence tended to show that the bank profited by the transaction. *Id.*..... 592
6. Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Improper Deductions. In assessing for taxation shares of stock no deduction may be made for real estate in other states owned by banks or by loan and investment companies. *Bank v. Geary County*..... 334
7. ——— No deduction for the assessed value of shares of stock of banks can be made on account of real estate acquired in the ordinary transaction of business which is retained beyond the periods limited by the state and federal laws for holding such real estate. *Id.*..... 334
8. Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Proper Deductions. The assessed value of real estate generally, and not merely the banking house or office building, and real estate representing an investment of original capital stock, may be deducted from the value of shares of stock, for the purposes of taxation. *Id.*..... 334
9. ——— In the case of state banks, the deduction on account of real estate necessary for the convenient transaction of business, including furniture and fixtures, may not exceed the value of real estate which the bank has capacity to hold for that purpose. *Id.* ..... 334
10. ——— The limitation stated above does not apply to national banks or loan or investment companies. *Id.*..... 334
11. Taxation—Banks and Loan Companies—No Deductions for Real Estate in Other States—Constitutional Law. The prohibition upon deducting from the value of shares of stock of

**BANKS AND BANKING—CONTINUED:**

- state banks and loan or investment companies the value of real estate situated in a foreign state does not infringe the 14th amendment to the constitution of the United States. *Id.* 334
12. ——— The prohibition does not result in double taxation by this state. *Id.* 334
13. **Taxation—Banks and Loan Companies—Reasonable Classification.** The classification of loan and investment companies with state and national banks for purposes of taxation is a reasonable classification, which does not infringe the constitutional requirement that taxes shall be assessed and levied at a uniform and equal rate. *Id.* 334
14. **Taxation—Banks and Loan Companies—Shares of Stock—Assessable at Full Value.** Shares of stock in banks, loan and investment companies are to be assessed at their true value, which may or may not coincide with their bookkeeping value. *Id.* 334
15. **Taxation—Banks and Loan Companies—Statute.** The tax contemplated by section 11236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and loan and investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation. *Id.* 334
16. **Taxation—Banks and Loan Companies—Value of Shares of Stock—Properly Determined.** Conduct of the state tax commission in arriving at the true value of shares of stock, not fraudulent or so arbitrary or capricious as to amount to fraud, is not subject to review by the courts. *Id.* 334

**BASTARDY—**See **ILLEGITIMATE CHILDREN**, 1-2.

**BENEFIT INSURANCE—**See **INSURANCE**, 3-9.

**BILL OF SALE—**See **FRAUD**, 4-6.

**BOARD OF EDUCATION:**

1. **Mandamus—To Compel Employment of Teacher—Writ Denied.** A writ of mandamus will not issue to compel the board of education of a city of the second class to employ an additional teacher in any particular school in the city. *Miles v. Board of Education* 137

**BONDS:**

1. **Administrator—Order of Probate Court—Appeal by Administrator—Appeal Bond Required.** An administrator who appeals to the district court from an order of the probate court, which charges him with interest on certain funds deducts the interest charges from an allowance of compensation previously made, and directs distribution of the estate, is required to give an appeal bond. *Elliott v. Baird* 317
2. **Appeal Bonds—Misdemeanor Cases—No Bail Bond—Constitutional Law.** The statutory appeal bond required of a defendant convicted of a misdemeanor is not a bail bond and does not violate the bill of rights which provides that "excessive bail shall not be required." *The State v. Coletti* 523
3. **Appeals—Appeal Bonds for Protection of State.** The statute providing that the bond to stay judgment of conviction in misdemeanor cases shall be approved by the judge is for the protection of the state alone and not for the benefit of the defendant or his surety. *Id.* 523



## BONDS—CONTINUED:

4. Appeals—Power of Legislature to Impose Terms. It is within the power of the legislature to impose additional requirements upon the exercise of the right to appeal to the supreme court from a criminal conviction, notwithstanding the provisions of the statute which gives an appeal "as a matter of right." *Id.*, 523
5. "Bond to Quiet Title"—Demurrer to Evidence—Sustained. In an action upon a bond given by defendant to plaintiff "to quiet title" to certain described lands the evidence supported the findings that the conditions of the bond had been performed by defendant. *Snodgrass v. Snodgrass*..... 281
6. "Bond to Quiet Title"—Evidence of Value of Certain Land—Properly Rejected. As the testimony showed that the plaintiff is not entitled to the forty-six acres between the two roads, it was not error to reject evidence of its value or evidence of the value of the land deeded in consideration of the bond sued on. *Id.* ..... 281
7. "Bond to Quiet Title"—Misdescription of Land—Reformation. Where there was a mistake in the description of land as given in a "bond to quiet title" and no reformation was asked, it was not prejudicial error for the trial court to treat the bond as reformed to correspond with the facts proven. *Id.*..... 281
8. "Bond to Quiet Title"—Tender of Quitclaim Deed—Sufficient Performance. In an action upon a bond given "to quiet title" to certain described lands, a tender of a quitclaim deed which quieted the title in plaintiff to all the land he could rightly claim was a sufficient performance of the conditions of the bond. *Id.* ..... 281
9. Condemnation Proceedings—Award of Damages—Appeal Bond. Where landowners attempted to appeal from the award of damages in condemnation proceedings and the appeal bond, though insufficient, was not void, it was error for the court to refuse the tender of a sufficient bond and dismiss the appeal. *Wood v. School District*..... 78
10. Indemnity Bond—Bank Cashier—Fraud—Loss—Bond Construed. In an action on a surety bond indemnifying a bank against loss occasioned by fraud or dishonesty of its cashier "amounting to embezzlement or larceny" the plaintiff may recover without technical proof of fraudulent acts as required in criminal prosecutions for embezzlement or larceny. *Bank v. Colton* ..... 365
11. Indemnity Bond—"Notice of Loss" Not Given—Waiver. The failure of the plaintiff to give "immediate notice" of the loss as provided in the bond was waived by the conduct of the surety company in placing its denial of liability upon other distinct grounds. *Id.*..... 365
12. Mandamus—Approval of Appeal Bond—Writ Denied. The supreme court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency, when the judge's good faith is not challenged. *Linderholm v. Walker*..... 684
13. Public Building—Indemnity Bond—Statute of Limitations. The terms of a bond given in connection with a contract for the erection of a public building considered, and held, the bond was one to supersede mechanics' liens, to which the general statute of limitations applies. *Iron Works Co. v. Surety Co.*... 699
14. Sewer Contract—Breach—Damages—Surety—Limitation of Actions. In an action by a city against a surety of a con-

**BONDS—CONTINUED:**

- tractor to recover costs and expenses incurred and paid by reason of the contractor's misfeasance, costs which accrued and were paid by the city within five years before the action was begun were not barred as to the surety company. *City of Topeka v. Ritchie*..... 384
15. Sewer Contract—Fraud—Judgment—Action against Surety—Limitation of Actions. While the statute of limitations as to the contractor had run on the overpayments as a cause of action, an action on the judgment was not barred as to such contractor. *Id.*..... 384
16. ——— When the overpayments were made, the cause of action to recover them accrued in favor of the city against the principal and surety and an action against the latter on its bond by reason of such overpayments became barred in five years. *Id.*..... 384
17. ——— Each count of the fifth amended petition states a cause of action in respect to all items contained therein which did not accrue more than five years before the beginning of this action. *Id.*..... 384
18. Sewer Contract—Indemnity Bond—Judgment against Contractor—Surety's Liability. A judgment against a sewer contractor for overpayments induced by fraudulent measurements is *prima facie* evidence of the amount of the surety company's indebtedness on account of such overpayments. *Id.*, 384
19. Statute Authorizing Certain School Bonds Repealed. Section 9081 of the General Statutes of 1915, authorizing certain school bonds, has been repealed by chapter 268 of the Laws of 1917. *Board of Education v. Clapp*..... 362

**BOUNDARIES AND SURVEYS:**

1. Boundary of City—City Ordinance—Scope of Title. That portion of a city ordinance which undertakes to exclude territory from the corporate limits is held to be ineffective because the only purpose expressed in the title to the ordinance is "extending the limits of the city." *The State, ex rel., v. City of Hutchinson* ..... 325
2. Boundary of City—Petition in Quo Warranto Construed. A petition in quo warranto against a city charging it with unlawfully refusing to exercise jurisdiction of a tract of land within the corporate limits is construed to allege that such tract had not been excluded from the city. *Id.*..... 325
3. Quo Warranto—Proper Proceeding to Determine City Boundaries. The state may maintain quo warranto against a city for the purpose of determining its true boundary, where its fault consists in confining its territorial jurisdiction within too narrow limits as well as where it undertakes to extend them too far. *Id.*..... 325

**BRIDGES:**

1. Heavy Vehicles—Planking Bridges—Statute Includes Horse-drawn Wagons. Section 8799 of the General Statutes of 1915, providing that drivers of certain heavy vehicles on a public highway shall plank all bridges and culverts before driving across them, applies to and includes horse-drawn wagons. *White v. Kansas City* ..... 495

**BROKERS—See AGENCY 24, 25.**

## C.

## CANCELLATION OF INSTRUMENTS:

1. **Improvident Bargain—Equity Jurisdiction.** Equity will not cancel a contract, such as an oil and gas lease, which is merely a bad or improvident bargain. *Alford v. Dennis* ..... 403

## CARRIERS—See COMMON CARRIERS.

## CENSORSHIP—See MOVING-PICTURE FILMS, 1-5.

## CHANGE OF BENEFICIARY—See INSURANCE, 3, 4.

## CHANGE OF VENUE:

1. **Disqualification of Judge—Calling in Judge of Another District.** Where a district judge is disqualified to sit in a case and he calls in the judge of another district, who after trying some of the issues declines to act further, it becomes the duty of the regular judge to request the judge of some other district to attend and serve as judge. *Berry v. Dewey* ..... 392

## CHATTEL MORTGAGES—See MORTGAGES, 4, 5, 7-11.

## CHIROPRACTORS:

1. **Chiropractic Examiners—Disposition of Fees.** Section 10 of chapter 291 of the Laws of 1913 requires the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board. *Robb v. Knapp* ..... 898

## CITIES—See MUNICIPAL CORPORATIONS.

## COAL MINING—See MINES AND MINERALS, 4, 5.

## COMMISSIONS—See AGENCY, 1-3, 23-25.

## COMMON CARRIERS:

1. **Interstate Bill of Lading—Acceptance by Consignee—Implied Contract to Pay Freight.** Where an interstate bill of lading authorizes the consignee to pay the freight charges, an implied contract by the consignee to pay the full established freight charges arises from his acceptance of the delivery of the goods under the bill. *Railway Co. v. Wagner* ..... 817
2. ——— In such case where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges. *Id.* ..... 817
3. **Interstate Commerce—Classification of Commodities—Binding on Court.** In an action to recover the amount of undercharges for freight shipments, computed according to schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles. *Railway Co. v. Young* ..... 875
4. **Interstate Commerce—Established Rates—Binding on Shipper and Carrier.** A schedule of freight rates duly filed and published by a railroad company, and not disapproved by the interstate commerce commission, has the force of a statute, binding alike on shipper and carrier. *Id.* ..... 875
5. **Schedule of Rates—Presumption that Schedule was Duly Published.** Where it is admitted that a schedule of rates has been duly filed with and approved by the interstate commerce commission the presumption, in the absence of showing to the contrary, is that the rates were duly published. *Railway Co. v. Wagner* ..... 817

COMMON CARRIERS—CONTINUED:

6. **Shipment of Cattle—Loss—Notice to Carrier.** The contract of shipment required notice of loss or injury during transportation or at loading or unloading places on the carrier's road. Held, the contract was concluded with delivery, and notice of loss occurring after delivery was not necessary. *Ott v. Railway Co.* ..... 254
7. **Shipping Cattle — Delay in Transportation — Damages — Instructions.** In an action for damages for delay in transportation of cattle, where the carrier knew of conditions likely to cause delay, and the carrier accepted the cattle for shipment without informing the shipper of such conditions, the carrier was liable for damages from the delay in the transportation. *Id.* ..... 254

COMPROMISE AND SETTLEMENT:

1. **Action on Tort—New Action on Contract—Statute of Limitations.** An action for damages resulting from negligence is not the same as one on a contract of settlement, and the pendency of an action founded on such a contract does not suspend the running of the statute of limitations against an action on the tort. *Thompson v. Railway Co.* ..... 668
2. **Compensation Act — Settlement — Written Release — Inadequate Compensation.** A voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter, in the absence of fraud or mistake, is valid and binding. *Dotson v. Manufacturing Co.*, 248
3. ——— A voluntary release and satisfaction, of an injured workman's claim under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer. *Id.* ..... 248
4. **Factory Act—Compromise by Widow—Rights of Infant Child.** A cause of action for the death of a workman, arising under the factory act, may not be compromised by the widow to the prejudice of an infant child entitled to share in the damages recoverable. *Jeffries v. Elevator Co.* ..... 811
5. **Injuries to Minor Son—Compromise by Father—Judgment by Consent—Parent's Authority.** Where a minor has sustained personal injuries which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries, notwithstanding the settlement negotiated by his father. *Leslie v. Manufacturing Co.* ..... 159
6. ——— An inadequate settlement by a father for injuries to his minor son does not bar an action by the son for such injuries on attaining his majority, although the father consented to a formal judgment therefor in a city court. *Id.* .... 159
7. **Joint Tort-feasors—Compromise with Part of Them.** On an oral compromise with several joint *tort-feasors*, a reservation of the right to proceed against the other joint *tort-feasors* may be made orally. *Scott v. Fair Association* ..... 653
8. **Judgment—Stipulation for Judgment—Estoppel to Deny Validity.** Where a stipulation for judgment signed by attorneys for both parties is used by one party to procure a continuance on hearing of a motion, such party is estopped from denying that his attorney signed such stipulation without authority. *Berry v. Dewey* ..... 392

## COMPROMISE AND SETTLEMENT—CONTINUED:

9. Reopening Account and Settlement—Evidence—Instructions. The withdrawal of evidence with reference to one item of an account held not to have been erroneous. *McCue v. Hope*.... 147
10. ——— The evidence held to have warranted the submission to the jury of the controversy regarding several items of an account. *Id.*..... 147
11. ——— Language in an instruction defining the character of the action held to have been in accordance with the decision of this court on a former appeal. *Id.*..... 147
12. Reopening Account and Settlement—Pleadings. The enlargement of the issues beyond those specifically presented by the pleadings held not to have been prejudicial. *Id.*..... 147
13. Settlement—Auto Goods—No Rescission of Contract of Settlement. Where a compromise and settlement were made of a sale of a stock of auto goods to defendant, the facts shown did not amount to a rescission of the contract of settlement by defendant, nor did they authorize such a rescission on the part of the plaintiff. *Tire Co. v. Kirk*..... 418
14. Settlement—Stipulation—Time of Payment—Interest. Where under a written stipulation the amount for which judgment should be rendered was stated, and the time of payment was postponed to a future period, such payment should draw interest from the time such payments were to be made. *Berry v. Dewey* ..... 392

## CONDEMNATION PROCEEDINGS:

1. Condemnation Proceedings—Award of Damages—Appeal Bond. Where landowners attempted to appeal from the award of damages in condemnation proceedings and the appeal bond, though insufficient, was not void, and a good and sufficient appeal bond was tendered, it was error for the court to refuse the tender. *Wood v. School District*..... 78
2. Condemnation Proceedings—Damages—Findings Not Conflicting. In condemnation proceedings a special finding that there was no evidence of the depreciation of each part of a farm lying on either side of the right of way does not conflict with another finding of the damages to the land as a whole. *Calkins v. Railroad Co.*..... 835
3. Condemnation Proceedings—Interest on Damages Sustained. A proceeding to condemn private property for public use does not involve a tort, and an owner whose land is so appropriated is entitled to interest on the damages sustained by him from the time of the appropriation. *Id.* ..... 835
4. Condemnation Proceedings—Warrant for Damages—Ownership—Arbitration—Estoppel. Where a grantor to whom a county warrant for road damages was issued voluntarily submitted to the county commissioners a question at issue, he is estopped from questioning the award of such arbitrators thus selected. *Lillard v. Johnson County* ..... 822
5. Eminent Domain—Railroad Right of Way—Elements of Damages. Where a part of a tract of land is taken for a railroad right of way, injury to the remaining land resulting from the digging of borrow pits, as well as danger of seeds being carried from noxious weeds growing on the right of way, are proper elements of damages to be considered by the jury. *Schaake v. Railway Co.* ..... 470
6. Eminent Domain—Railroad Right of Way—Interest on Damages. On an appeal from an award in condemnation pro-

CONDEMNATION PROCEEDINGS—CONTINUED:

- ceedings the allowance of interest from the date of the appropriation of the land was not erroneous. *Craig v. Railroad Co.*, 838
7. Eminent Domain—Railroad Right of Way—Measure of Damages to Whole Farm. In determining the damages to a farm resulting from appropriation of a railroad right of way, no reversible error was committed in sustaining objections on cross-examination of a witness as to the value of specific tracts of the farm, where such witness testified to the damage to the farm as a whole. *Id.*..... 838
8. Eminent Domain—Railroad Right of Way—Special Questions Refused—No Error. In condemnation proceedings no error is committed in the refusal to require the jury to answer questions as to how much depreciation in the value of each of several tracts forming a part of the farm was caused by the appropriation of the right of way. *Id.*..... 838
9. ——— In such a case no error is committed in the refusal to require the jury to enumerate the considerations that tended to make the farm less valuable by reason of the location of the railroad. *Id.* ..... 838

CONDITIONAL PROMISE—See NEGOTIABLE INSTRUMENTS, 12, 13.

CONSPIRACY:

1. Assault—Conspiracy—Instructions. An instruction is not to be condemned by separating from its context language in one part of it and ignoring the instruction as a whole. *Drysdale v. Wetz* ..... 680
2. ——— Objections to certain instructions examined and held to be without merit, the abstract making no reference to the other instructions given. *Id.*..... 680
3. Assault—Conspiracy—Order of Proof—Judicial Discretion. In an action for damages resulting from a conspiracy to assault there was no prejudicial error in the admission of declarations made by one of the conspirators before proof of the conspiracy, where subsequent evidence sufficiently established the conspiracy alleged. *Id.*..... 680
4. Wrongful Death—Conspiracy—Evidence. There was evidence sufficient to show a conspiracy to assault on the part of the defendants. *Berry v. Dewey*..... 593

CONSTITUTIONAL LAW:

1. Appeal Bonds—Misdemeanor Cases—No Bail Bond—Constitutional Law. The statutory appeal bond required of a defendant convicted of a misdemeanor is not a bail bond and does not violate the bill of rights which provides that "excessive bail shall not be required." *The State v. Coletti*..... 523
2. Appeals—Appeal Bonds for Protection of State. The statute providing that the bond to stay judgment of conviction in misdemeanor cases shall be approved by the judge is for the protection of the state alone and not for the benefit of the defendant or his surety. *Id.*..... 523
3. Appeals—Power of Legislature to Impose Terms. It is within the power of the legislature to impose additional requirements upon the exercise of the right to appeal to the supreme court from a criminal conviction, notwithstanding the provisions of the statute which gives an appeal "as a matter of right." *Id.* ..... 523
4. Drainage District Supervisors—Tenure of Office—Constitutional Law. The provision in chapter 168 of the Laws of 1911

## CONSTITUTIONAL LAW—CONTINUED:

- fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the constitution forbidding the legislature to create any office the tenure of which is longer than four years. *The State, ex rel., v. Drainage District*..... 575
5. Enactment of Statute—Appropriation of Money—By “Concurrent Resolution.” Where a “House Concurrent Resolution” purporting to appropriate public money passed both houses, was approved by the governor, and in all respects received the same treatment as a regularly enacted bill, it will be regarded as a valid appropriation statute. *The State, ex rel., v. Knapp* ..... 701
6. Judgment—Illegal City Court—Appeal—Jurisdiction of District Court. Where a statute creating a city court was unconstitutional, and on appeal to the district court the case was tried on its merits, without objection by either party, it is too late after judgment to question the jurisdiction of the district court on the ground of the illegality of such city court. *Neal v. Kent* ..... 239
7. Statutes—Amendment by Implication. The provisions of the state constitution that “no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed” has no application to an amendment by implication. *The State v. Coletti*..... 523
8. Taxation—Banks and Loan Companies—No Deductions for Real Estate in Other States—Constitutional Law. The prohibition upon deducting from the value of shares of stock of state banks and loan or investment companies the value of real estate situated in a foreign state, does not infringe the 14th amendment to the constitution of the United States. *Bank v. Geary County* ..... 334
9. ——— The prohibition does not result in double taxation by this state. *Id.* ..... 334
10. White Slave Law—Regularly Enacted. Chapter 179 of the Laws of 1913, commonly known as the “white slave law” was regularly enacted. *The State v. Freeman*..... 670

## CONTINUANCE:

1. Application for Continuance — Bad Faith. The evidence supported the finding of the court that the application for a continuance on account of defendant's sickness was not made in good faith, and a new trial was properly refused. *Ladd v. Flato* ..... 312
2. Continuance — Insufficient Grounds Shown. The defendants applied for a continuance on the ground that one of their attorneys was a member of the legislature and could not be present at the trial because the legislature was in session. The application was properly denied. *Berry v. Dewey*..... 593
3. ——— An application for continuance by a party on the ground that he desired to attend the trial as a witness, and was prevented by sickness in his family, unsupported by any sworn testimony, was properly denied. *Id.*..... 593
4. Trial—Motion for Continuance—Judicial Discretion. No abuse of discretion is shown in refusing the application of a corporation defendant for a continuance in order to procure the attendance of its president, who had absented himself with

CONTINUANCE—CONTINUED:

- knowledge that the case had been set for trial. *Gurner v. Grocery Co.* ..... 5

CONTRACTS:

1. **Agency Unambiguous Contract — Parol Evidence.** Where an agent's contract providing for a commission for finding a purchaser was complete and unambiguous it could not be contradicted or modified by parol evidence of a prior oral agreement. *Buxton v. Colver* ..... 871
2. **Banking — Liability of Depositor of Dishonored Sight Draft.** Where a depositor is given credit by a bank for the amount of a sight draft deposited for collection, and such draft is dishonored, the depositor is liable to the bank for the amount of such dishonored draft. *Bank v. Schaefer*..... 868
3. **Benefit Insurance—Agreement Not to Change Beneficiary—Vested Right.** A vested interest in a certificate issued by a mutual benefit association may be created after its issuance as well as at that time by an agreement on the part of the member not to change the beneficiary in consideration of the payment of assessments. *Sipe v. Sipe*..... 742
4. **Benefit Insurance—Agreement of Wife to Make Payments—Substantial Performance.** Where a wife agreed with her husband to keep up payments on his benefit certificate, which named the wife as beneficiary in consideration of the husband's promise not to change the beneficiary, the evidence shows a substantial compliance on the part of the wife. *Id.*... 742
5. **Benefit Insurance—Application—Omissions by Agent—Policy Valid.** Where an applicant for benefit insurance gives to the agent correct answers to the questions contained in his application, but the agent leaves out such answers, and the applicant signs such application without reading, action on the policy will not be defeated by reason of the omission of such answers. *Shinn v. Benefit Association*..... 134
6. **Bill of Sale—Execution by Unauthorized Agent.** The execution of a bill of sale and other instruments by one unauthorized to sign them does not bind the party in whose name the instruments are signed. *Implement Co. v. Willhite*..... 56
7. **Building Tunnel—Engineer's Estimate—Payment—Accord and Satisfaction.** Under a contract for building a tunnel where the railroad engineer made his final estimates of work done, the acceptance by the contractor of a payment on such estimates did not bind him to an accord and satisfaction of his entire claim. *Contracting Co. v. Railway Co.*..... 799
8. **Building Tunnel—Payment for "Extras."** Under a contract for building a railroad tunnel which provided that if extras were furnished for which no prices were fixed no payments should be made for them unless they had been ordered in writing by the railroad engineer, payment for certain extras demanded by the contractor were properly denied. *Id.*..... 799
9. ——— Where the chief engineer ordered that posts should be reset in trenches with concrete foundations instead of on the floor of the tunnel, and furnished a blueprint showing a plan of that work, it is deemed to be sufficient to meet the requirement that extra work must be done on a written order. *Id.* ..... 799
10. **Compensation Act—Release—Mutual Mistake.** The paper relied on as a release appears to have been signed when the



## CONTRACTS—CONTINUED:

- parties were mutually mistaken as to the extent of plaintiff's injuries, and the sum therein named being manifestly inadequate such instrument is not binding. *Smith v. Kansas City*, 518
11. Compensation Act—Settlement—Written Release—Inadequate Compensation. A voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter, in the absence of fraud or mistake, is valid and binding. *Dotson v. Manufacturing Co.*..... 248
  12. ——— A voluntary release and satisfaction of an injured workman's claim under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer. *Id.*..... 248
  13. Contract—Ambiguity—Explanation Admissible. The terms of a contract being open to more than one interpretation, testimony of the circumstances surrounding the execution of the contract may be admitted to aid in its interpretation and in ascertaining the intended meaning. *Contracting Co. v. Railway Co.* ..... 799
  14. Contract—Building Tunnel—Amendment to Petition—No New Action. The several breaches of the entire contract upon which the action was brought constitute only a single cause of action, and an amendment to the petition setting up an additional item is not barred by the statute of limitations. *Id.*... 799
  15. Contract by Telegram — Sale of Melons — Evidence for Jury. Under the facts disclosed by the plaintiff's evidence, and stated in the opinion, it was not error for the court to overrule a demurrer to that evidence. *Bruce v. Hayes*. .... 115
  16. Contract by Telegram—Sale of Melons—Instruction Not Prejudicial. As against a defendant there is no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify the instruction. *Id.*..... 115
  17. Contract — Lease — Improvements — Limitation of Actions — Statute of Frauds. Where the time fixed for the payment of an oral obligation might have arrived within one year, and the promisee had fully performed his part, the statute of limitations did not begin to run until the obligation matured and the obligation was not repugnant to the statute of frauds. *Henshaw v. Smith*. .... 599
  18. Contract of Employment—Consistent Findings. In an action against an estate for services performed for decedent there was no inconsistency in the findings relative to the time when payment was to be made for such services. *Dubbs v. Haworth*, 603
  19. Contract of Employment—Proof of Claim Against Estate—Verification. Where pursuant to a single contract two persons jointly perform services for another since deceased, the affidavit of one of the joint performers is a sufficient verification of the proof of claim against the estate of the employer. *Id.*..... 603
  20. ——— Where the administrator's objection to such affidavit was too obscure to apprise the court of the specific nature of any defect therein, the defect, if any, will be deemed waived. *Id.*..... 603
  21. Contract—Partly Valid—Enforcement. If a contract contains provisions some of which are valid and some of which are invalid, and the lawful matter can be readily severed from that which is unlawful, the lawful portion of the contract will be upheld. *Henshaw v. Smith*. .... 599

## CONTRACTS—CONTINUED:

23. **Contract—To Execute Oil and Gas Lease—Within Statute of Frauds.** A contract to execute an oil and gas lease granting the right to explore, and if mineral be found, to produce and sever, is a contract for the sale of an incorporeal hereditament, within the meaning of the sixth section of the statute of frauds. *Robinson v. Smalley*..... 842
24. ——— A contract by a husband, whereby for a consideration he agrees to procure his wife to sign an oil and gas lease of the character described, need not be in writing to be actionable. *Id.*..... 842
25. **Contract—To Make Minor an Heir—Insufficient Evidence.** In an action to compel specific performance of a contract to leave all defendant's property to plaintiff the evidence did not prove the contract alleged in plaintiff's petition. *McKeown v. Carroll* ..... 826
26. **Deeds in Escrow—Fraud Discovered—Rescission of Contract—Reconveyance.** Where deeds to land are deposited in escrow to wait final payment, no title passes until full payment is made, and where the grantee is entitled to rescind on the ground of fraud discovered, no formal offer to reconvey the property is required. *Business Blocks Co. v. Gregory*..... 33
27. **Exchange of Property—False Representations—Not Expression of Opinion.** The representation was that a stock of merchandise contained certain goods invoiced at cost, to amount with certain articles of agreed value to a certain sum. *Held*, the representation was not a mere expression of opinion as to value. *McKenna v. Morgan*..... 478
28. **Exchange of Property—Fraudulent Representations—Statute of Limitations.** Where in an exchange of property plaintiff sought to recover for shortage in land, and defendant counterclaimed for shortage in quantity of stock of merchandise he received, section 6994 of the General Statutes of 1915 prevents application of the statute of limitations to the cross demand. *Id.*..... 478
29. **Exchange of Property—Payments on Contract—No Waiver of Fraud.** Where a counterclaim was based on a fraudulent representation of the quantity of goods in an exchange of property, the right to recover for the fraud was not defeated by making payments and otherwise recognizing the obligation of the contract. *Id.*..... 478
30. **Hail Insurance—Oral Contract by Agent—Premium Accepted—Contract Valid.** Where an insurance agent made an oral contract for hail insurance and forwarded the premium to the company which retained control and exercised ownership over it the company is estopped to deny the contract though its agent had no authority to make an oral contract for insurance. *Williams v. Insurance Co.*..... 74
31. **Homestead—Conveyance by Wife Alone—Right of Rescission by Wife—Estoppel.** Having in good faith explained to the grantees concerning the long absence of her husband the plaintiff is not estopped either by her deeds or by her conduct or acquiescence from maintaining this action. *Thompson v. Millikin* ..... 717
32. **Homestead—Lease and Contract Not Signed by Wife—Void.** Where a husband and wife occupy land as their homestead, any contract affecting the title and right of possession thereto made by the husband and not signed by the wife is absolutely void. *Walz v. Keller*..... 124

## CONTRACTS—CONTINUED:

33. ——— Although the homestead may be sold for the payment of obligations contracted for its purchase, the purchaser and his wife are not precluded from defending the homestead right as against action brought by the seller based on void contracts. *Id.*..... 124
34. Implied Contract—Use of Patented Invention—Jurisdiction of State Courts. An action by the owner of a patent to recover on an implied contract for use of a patented invention, with patentee's knowledge and consent, is not an action for the infringement of a patent and the state courts have jurisdiction, notwithstanding the answer pleads the invalidity of the patent *Ridgway v. Wetterhold.*..... 217
35. Interstate Bill of Lading—Acceptance by Consignee—Implied Contract to Pay Freight. Where an interstate bill of lading authorizes the consignee to pay the freight charges, an implied contract by the consignee to pay the full established freight charges arises from his acceptance of the delivery of the goods under the bill. *Railway Co. v. Wagner.*..... 817
36. ——— In such case where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges. *Id.*..... 817
37. Lease—Breach of Covenant to Repair—Damages which could be Averted. Where a landlord breaches his contract to make repairs and the tenant receives personal injuries, she will not be permitted to recover damages which could have been averted by making the repairs at slight expense on her part. *Murrell v. Crawford* ..... 118
38. Lease—Breach of Covenant to Repair—Personal Injuries—Contributory Negligence. Where a tenant knows that a porch is in need of repair but continues to use it and is injured thereby, she is guilty of contributory negligence notwithstanding the landlord had promised to repair the porch, but failed to do so. *Id.*..... 118
39. Lease—Breach of Covenant to Repair—Personal Injuries—Measure of Damages. On a breach of covenant by the landlord to make repairs, the measure of damages is the difference between the rental value of the premises as they were, and what it would have been if they had been put and kept in repair. *Id.*..... 118
40. ——— The ordinary rule is that an award of damages for a landlord's breach of covenant to repair a dwelling house is not extended to include a liability for personal injuries sustained by the tenant in the use of the unrepaired property. *Id.*..... 118
41. Lease—Grain Rent—Pasturing Growing Crop—Rights of Landlord. Under a lease providing for a grain rent to be delivered at railway station, the landlord had no claim against his tenant for a share of the proceeds of pasturing the growing crop. *Mull v. Boyle* ..... 579
42. ——— In an action by the landlord against tenants for damages done to the land by the pasturage, it is not error to instruct that they had a right to pasture the growing crop, being responsible to the owner for any resulting injury. *Id.*.... 579
43. Lease—Improvements by Tenant—Reimbursement—When Due. Where a tenant makes improvements on the farm for which the landlord agrees to pay when the tenancy is terminated, reimbursement for such improvements is due when the

CONTRACTS—CONTINUED:

- landlord voluntarily terminates the tenancy. *Henshaw v. Smith* ..... 599
44. Lease—Landlord to Furnish Stock—Default of Landlord—Remedies. Where, by the terms of a lease, the landlord agreed to furnish cattle and hogs, and, in addition to a crop rental, the increase of the stock was to be divided, and the landlord failed to furnish any stock, the tenant must pay the crop rent, but is entitled to recoup his damages sustained by the landlord's default. *Seapy v. Smart* ..... 294
45. Lease—Measure of Damages—Rule of Construction. Where parties, by agreement, fix the measure of recovery due from the one to the other, their agreement governs, and abstract principles of law relating to the measure of recovery when agreements are wanting are inapplicable. *Henshaw v. Smith*, 599
46. Lease of Hotel—Covenant Not to Underlet—Leasing One Room—Oral Consent. Where a hotel lease contained a covenant that the premises should not be underlet without written consent of the landlord, and the lessee with oral consent of the landlord let one room in which a small printing plant was installed, the landlord thereby waived any right to terminate the lease for such a subletting. *Norris v. McKee*..... 63
47. Lease—Repairs—No Implied Obligations. Where a written lease provides that repairs are to be made by the tenant, the landlord's subsequent promise to make them is not enforceable, unless supported by a new consideration. *Garner v. Grocery Co.* ..... 5
48. ——— The landlord is not under any implied obligation to make repairs. *Id.* ..... 5
49. Life Insurance—Applications—Representations Not Warranties. A life insurance policy provided that the statements made by the insured should in the absence of fraud be deemed representations and not warranties. Held, that good faith in making such statements was sufficient, although they may have been incorrect in fact. *Sharrer v. Insurance Co.*.... 650
50. Mining—Coal—Unambiguous Contract—Interpretation for Court. Where a contract is not ambiguous and there is no charge of fraud, accident or mistake, the intention of the parties must be ascertained from the contract, and its construction is a matter of law for the court. *Walsh v. Fuel Co.*, 29
51. Note—Conditional Promise to Pay—Impossible Condition—Liability. Whenever subsequent impossibility of meeting the conditions of a contract might readily have been foreseen by the party obligated to perform, he will not be excused from performance on the ground of impossibility. *Carter v. Wilson*..... 200
52. ——— Where a person executed a note for the debt of another on condition that he was to pay only that portion of the debt which a sale of chattel security lacked of paying, and the chattel mortgage was void and no sale could be made, the maker was released from all liability on the note. *Id.*..... 200
53. Note—Oral Agreement Varying Indorsement—No Defense. A claim by the indorser of notes that it was orally agreed that on certain conditions she would not be called on to pay the notes, is a variance from the written instrument and constitutes no defense. *Investment Co. v. Gamble*..... 791
54. Oil and Gas Lease—Failure to Develop—Lessor's Remedy—Damages—Forfeiture. Where an oil lease embraced two

## CONTRACTS—CONTINUED:

- separate tracts of land and the lessee failed to develop one of the tracts for fourteen years the lessor may recover damages for delay and the lessee may be required to develop the tract within reasonable time under penalty of forfeiture of the lease. *Alford v. Dennis*..... 403
55. Oil and Gas Lease—Group of Buyers—Title in Trust for All—Innocent Purchasers. Where an oil and gas lease is executed to a member of a group of buyers, who takes title for the benefit of all, one who buys from the trustee, with notice of the trust, acquires no beneficial title against the actual owners. *Goss v. Rothrock*..... 272
56. Oil and Gas Lease—Improvident Contract—Cancellation—Forfeiture. Equity will not cancel a contract which is merely a bad or improvident bargain, nor will equity arbitrarily declare a forfeiture for breach of an implied contract. *Alford v. Dennis*..... 403
57. Oil and Gas Lease—No Conveyance of Real Estate. The provisions of an oil and gas lease examined and held the instrument did not operate to sever and convey as real estate subsurface mineral deposits. *Hover v. McNeill*..... 492
58. Oil Lease—Oral Contract—Statute of Frauds—Trusts. Where an oil and gas lease negotiated by several lessees is made to one of them as trustee for the benefit of all, and each of the group of buyers subsequently paid his share, their claims cannot be defeated on the ground that the transaction was within the statute of frauds. *Goss v. Rothrock*..... 272
60. Oil Lease—Sale by Trustee—Ratification by Owners—Estoppel. Where a trustee makes a sale of an oil lease a beneficial owner of the lease who elects to look to such trustee for his share of the purchase price thereby ratifies the sale, and is estopped from claiming title as against the purchaser at such sale. *Id.*..... 272
61. Oral Promise to Devise Property—Consideration—Heir's Release of Life Insurance. Where the holder of a life insurance policy desiring to collect its surrender value, induced his heir to sign a release under his oral promise to leave her at his death a certain share of his property, the release was a good consideration for the promise, and it may be enforced. *Stahl v. Stevenson*..... 447
62. Oral Promise to Leave Property to Heir—Law of Wills Does Not Apply. A contract by which the obligor undertakes to make provision at his death for the obligee, although no present title to any property passes, is not required, in order to be valid, to be executed in accordance with the statute relating to wills. *Id.*..... 844
63. Oral Promise to Leave Property to Heir—Trust by Implication of Law—Statute. An oral promise by an ancestor for good consideration to leave at his death a share of his property to an heir presumptive impressed a trust upon his estate, which trust arises by implication of law and is not forbidden by the statute. *Id.*..... 844
64. Real-estate Agent—Purchaser Found—Contract Made—Commission Earned. A real-estate agent has earned his commission when he procures a purchaser ready, willing and able to buy upon terms which the owner has accepted or agreed to accept. *Wacker v. Hester*..... 710

## CONTRACTS—CONTINUED:

65. **Real Estate Broker—Contract by Correspondence—Binding Contract.** Correspondence between a landowner and a broker by letters and telegrams relating to finding a purchaser for land and to the commission to be paid is held to constitute a binding contract between them, and the interpretation of such a contract is a question of law for the court. *Buxton v. Colver*, 871
66. **Sale—Breach of Warranty—Burden of Proof.** In an action for breach of warranty in the sale of a jack, where the facts touching the alleged failure of warranty were peculiarly within the knowledge of the vendee it was proper to impose upon the vendee the burden of showing that the jack did not measure up to the warranty. *Eagan v. Murray*. . . . . 193
67. **Sale—Interest in Land—No Consideration—Specific Performance.** A contract signed by a mother and two sons purporting to sell to the mother an interest of one son in land in which he had no interest, but which the mother owned absolutely was without consideration, and specific performance of the contract will be refused. *Moon v. Moon*. . . . . 737
68. **Sale—New Contract—Effect of Conditional Sale—No Renewal of Chattel Mortgage.** After a sale and rescission of a contract of purchase of a machine, a new contract of conditional sale of the same machine entered into did not reanimate a chattel mortgage covering the machine which was extinguished by the former rescission. *Implement Co. v. Willhite*. . . . . 56
69. **Sale of Jack—Breach of Warranty—Petition—Prayer for Relief.** Ordinarily a petition which narrates several distinct breaches of a valid contract states a cause of action with sufficient precision against the party who breached the contract, although the prayer may be for alternative relief, and a cause of action so pleaded is good against a demurrer. *Eagan v. Murray*. . . . . 193
70. ——— The prayer of a petition is no part of the statement of facts, and if the cause of action is stated and proved the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part with the relief prayed for. *Id.*. . . . . 193
71. **Sale of Land—Nonmarketable Title—Specific Performance.** Where a vendor agreed to furnish an abstract of title satisfactory to the vendee and the abstract furnished showed an unmarketable title, specific performance of the contract of sale was properly refused. *Canaday v. Miller*. . . . . 577
72. **Sale of Plow—Proposition by Letter—No Acceptance—No Contract.** A plow company made by letter a proposition to a local dealer whereby the dealer was to assume the responsibility for the completion of a sale of a plow. The dealer never accepted the proposition and is not liable for the price. *Plow Works v. Thorne*. . . . . 849
73. **Sale of Threshing Machine—Note and Mortgage—Breach of Warranty—Rescission.** Where a machine is sold with warranty and notes and chattel mortgage given, and the machine fails to fill the warranty, the purchaser may rescind the contract, and thereby effect the extinguishment of the chattel mortgage. *Implement Co. v. Willhite*. . . . . 56
74. ——— The facts relating to a return of a threshing machine which has proved altogether worthless for the purpose for which it was bought, examined and held that there was a substantial compliance with the contract provisions as to the place to which it was to be returned. *Id.*. . . . . 56

## CONTRACTS—CONTINUED:

75. **Settlement—Auto Goods—No Rescission of Contract of Settlement.** Where a compromise and settlement were made of a sale of a stock of auto goods to defendant, the facts shown did not amount to a rescission of the contract of settlement by defendant nor did they authorize such a rescission on the part of the plaintiff. *Tire Co. v. Kirk*..... 418
76. **Sewer Contract—Breach—Damages—Surety—Limitation of Actions.** In an action by a city against a surety of a contractor to recover costs and expenses incurred and paid by reason of the contractor's misfeasance, costs which accrued and were paid by the city within five years before the action was begun were not barred as to the surety company. *City of Topeka v. Ritchie*..... 384
77. **Sewer Contract—Fraud—Judgment—Action against Surety—Limitation of Actions.** While the statute of limitations as to the contractor had run on the overpayments as a cause of action, an action on the judgment was not barred as to such contractor. *Id.*..... 384
78. ——— When the overpayments were made, the cause of action to recover them accrued in favor of the city against the principal and surety and an action against the latter on its bond by reason of such overpayments became barred in five years. *Id.*..... 384
79. ——— Each count of the fifth amended petition states a cause of action in respect to all items contained therein which did not accrue more than five years before the commencement of this action. *Id.*..... 384
80. **Sewer Contract—Indemnity Bond—Judgment against Contractor—Surety's Liability.** A judgment against a sewer contractor for overpayments induced by fraudulent measurements is *prima facie* evidence of the amount of the surety company's indebtedness on account of such overpayments. *Id.*, 384
81. **State Agent of Insurance Company—Contract for Services—State Agent Liable.** Where one contracts with the state agent of an insurance company to render service for the agent, and renders such service under the contract, the contractor must look to the agent for his compensation. *The State, ex rel., v. Insurance Co.*..... 266
82. **Street Lighting Contract—Defaulted Payments—Interest Thereon.** Where a city defaulted under its contract with a street lighting company in making payments the defaulted payments should only draw interest at the legal rate from the dates when they were severally due. *Street Lighting Co. v. City of Wichita*..... 4
83. **Street Lighting Contract—Notice of Expiration Not Given—Contract Renewed.** In an action upon a contract for street lighting which provided that the contract should continue another term unless sixty days' notice be given of intention to terminate, the evidence failed to show giving of the notice by either party or a waiver thereof and the contract was renewed. *Id.*..... 4
84. **Written Contract—Contemporaneous Oral Agreement—Oral Agreement Void.** Where plaintiff sought to recover on a written contract for the payment of money and also on a verbal contract relating to the same contract made at the same time, the contemporaneous oral agreement was properly disregarded. *Lesem v. Harris*..... 222

CONTRACTS—CONTINUED:

85. **Written Contract—Provision for Termination—Cannot be Varied by Parol.** An unambiguous written contract for sale of tractors which definitely provided that it might be terminated by either party by giving thirty days notice in writing could not be contradicted, altered or added to by parol evidence. *Emerson-Brantingham Co. v. Lyons*..... 733
86. ——— **The notice given by one of the parties to the contract in question is held to be sufficient and effective to end the contract relation, and such party did not become liable to the other for damages through the exercise of the option provided for in the contract.** *Id.*..... 733
87. **Written Order—To Pay Debt of Another—No Binding Contract.** A written order by an employee to his employer to pay his creditor a sum of money does not create a liability against the employer and in favor of the creditor, unless the employer agrees to make such payment. *Id.*..... 733

CONTRIBUTION:

1. **Joint Tort-feasors—Damages—Contribution.** It is a general rule that where one of several joint tort-feasors is compelled to pay damages for the joint wrong of all, he cannot enforce contribution or secure reimbursement from any of the other tort-feasors. *Rucker v. Allendorph* ..... 771

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

CONVERSION:

1. **Chattel Mortgage—Conditional Sale by Mortgagee—Sale Invalid—Conversion.** Where the mortgagee takes charge of chattel mortgaged property and makes a conditional sale of the property such sale is invalid and amounts to conversion by the mortgagee, and he is liable for the fair and reasonable value of the property at the time of such conversion. *Bank v. Wherry* ..... 224
2. **Compromise and Settlement—Rescission—Damages as for Conversion—Petition.** In an action for damages for the conversion of goods by a bailee no error is committed in striking from his answer statements amounting to reasons for the conversion, where the facts stated constitute no legal justification. *Tire Co. v. Kirk*..... 418
3. ——— **A claim for damages for malicious prosecution in a civil action held to have been properly stricken out.** *Id.*..... 418
4. **Compromise and Settlement—Rescission—Measure of Damages.** Although the owner of goods in the hands of a bailee denies ownership, if the holder wrongfully sells them the measure of his liability for conversion is their value at the time of sale, although a demand for them is not made until later. *Id.* ..... 418

CORPORATIONS:

1. **Foreign Insurance Company—Process—Service on Agent.** Service upon a duly licensed general agent of a foreign insurance company whose principal office is in the county is sufficient to give the court jurisdiction of the company. *Snelling v. Benefit Association*..... 227
2. ——— **To acquire jurisdiction in the way stated does not violate the fourteenth amendment to the federal constitution.** *Id.* ..... 227



## CORPORATIONS—CONTINUED:

3. **Foreign Insurance Company—Where Suit May be Brought—Statute.** Under section 53 of the civil code an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found, regardless of where the cause of action arose, or of the residence of the plaintiff. *Id.*..... 227
4. ——— The provisions in the last part of section 53 that an action against a foreign insurance company may be brought in any county where the cause of action or some part thereof arose is a permissive and cumulative remedy. *Id.*..... 227
5. **Railway Company—In Hands of Receiver—Service of Process.** Where a railway company is in the hands of a receiver who has taken possession and control of all assets and property of the corporation, service of summons in an action against the railway corporation on a station agent in the employ of the receiver is not good service on the corporation. *Chilleti v. Railway Co.*..... 297
6. **Surety Company—Benefit of Statute of Limitations.** The defendant surety company was not, when this action was begun, a foreign corporation within the purview of section 20 of the civil code. *City of Topeka v. Ritchie.*..... 384
7. **Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Improper Deductions.** In assessing for taxation shares of stock no deduction may be made for real estate in other states owned by banks or by loan and investment companies. *Bank v. Geary County.*..... 334
8. ——— No deduction for the assessed value of shares of stock of banks can be made on account of real estate acquired in the ordinary transaction of business which is retained beyond the periods limited by the state and federal laws for holding such real estate. *Id.*..... 334
9. **Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Proper Deductions.** The assessed value of real estate generally, and not merely the banking house or office building, and real estate representing an investment of original capital stock, may be deducted from the value of shares of stock, for the purposes of taxation. *Id.*..... 334
10. ——— In the case of state banks, the deduction on account of real estate necessary for the convenient transaction of business, including furniture and fixtures, may not exceed the value of real estate which the bank has capacity to hold for that purpose. *Id.*..... 334
11. ——— The limitation stated above does not apply to national banks or loan or investment companies. *Id.*..... 334
12. **Taxation—Banks and Loan Companies—No Deductions for Real Estate in Other States—Constitutional Law.** The prohibition upon deducting from the value of shares of stock of state banks and loan or investment companies the value of real estate situated in a foreign state does not infringe the 14th amendment to the constitution of the United States. *Id.*, 334
13. ——— The prohibition does not result in double taxation by this state. *Id.*..... 334
14. **Taxation—Banks and Loan Companies—Reasonable Classification.** The classification of loan and investment companies with state and national banks for purposes of taxation is a reasonable classification, which does not infringe the consti-

CORPORATIONS—CONTINUED:

- tutional requirement that taxes shall be assessed and levied at a uniform and equal rate. *Id.*..... 334
15. **Taxation—Banks and Loan Companies—Shares of Stock—Assessable at Full Value.** Shares of stock in banks and loan companies are to be assessed at their true value which may not coincide with their bookkeeping value. *Id.*..... 334
16. **Taxation—Banks and Loan Companies—Statute.** The tax contemplated by section 11236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and loan and investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation. *Id.*..... 334
17. **Taxation—Banks and Loan Companies—Value of Shares of Stock—Properly Determined.** Conduct of the state tax commission in arriving at the true value of shares of stock, not fraudulent or so arbitrary or capricious as to amount to fraud, is not subject to review by the courts. *Id.*..... 334

COUNTY ATTORNEY—See CRIMINAL LAW, 9-11.

COURTS:

1. **Effect of Total Invalidity of Act Creating Court—Appellate Jurisdiction.** Where a case was appealed from a city to a district court, and where judgment was rendered, the district court having jurisdiction of the parties and subject matter, it was too late to question its jurisdiction to entertain the appeal, though the act creating the city court was unconstitutional. *Neal v. Kent* ..... 239
2. **Judgment—Illegal City Court—Appeal—Jurisdiction of District Court.** Where a statute creating a city court was unconstitutional, and on appeal to the district court the case was tried on its merits, without objection by either party, it is too late after judgment to question the jurisdiction of the district court on the ground of the illegality of such city court. *Id.*... 239
3. **Jurisdiction of State Court—Infringement of Patent.** Action by owner of patent upon implied contract to pay reasonable value of its use with owner's consent is not an action for infringement of patent, and state courts have jurisdiction, notwithstanding answer pleads invalidity of patent. *Ridgeway v. Wetterhold*..... 217
4. **Term of Court—Adjournment by Sheriff.** A sheriff may in pursuance of an order of the court adjourn the term of the district court *sine die* without the personal presence of the judge in the court room at the time the adjournment is announced. *Mulcahy v. City of Moline*..... 531

CREDITORS' BILL:

1. **Creditor's Bill—Demurrer to Evidence—Wrongfully Sustained.** In a suit in the nature of a creditor's bill it was error for the court to sustain a demurrer to the evidence. *Kinkel v. Chase* ..... 275
2. **Judgment—Joint Debtors—Satisfaction by One—Subrogation.** A surety who satisfies a judgment against his principal, and files with the clerk a notice of his intention to claim repayment under section 474 of the civil code, has all the rights and remedies of an owner of the judgment for the purpose of enforcing repayment. *Id.*..... 275
3. **Judgment on Creditor's Bill—Only Parties Affected Thereby.** A judgment against the defendant in a suit in the nature of

## CREDITORS' BILL—CONTINUED:

- a creditor's bill will not inure to the benefit of another creditor of defendant, who is neither party nor privy to the judgment. *Id.*..... 275
4. Judgment Rendered—No Journal Entry Recorded—Judgment Valid. The omission of the clerk to perform the ministerial duty of recording a judgment does not destroy the judgment nor does its validity or effect remain in abeyance until it is formally entered on the journal. *Id.*..... 275
5. Will—No Conveyance or Alienation of Real Estate. Rule followed that a will is not a conveyance or an alienation of the real estate described therein. *Postlethwaite v. Edson.*..... 619
6. Wills—Devise of Homestead—Rights of General Creditors. "Creditors," as the expression is used in section 11752 of the General Statutes of 1915 concerning wills, means and includes general creditors. *Id.*..... 619
7. ——— Where a judgment debtor by will devised his homestead to a devisee who never occupied the land, such devisee took the land subject to the rights of the judgment creditors of the testator. *Id.*..... 619

## CRIMINAL LAW:

1. Appeal Bonds—Misdemeanor Cases—No Bail Bond—Constitutional Law. The statutory appeal bond required of a defendant convicted of a misdemeanor is not a bail bond and does not violate the bill of rights which provides that "excessive bail shall not be required." *The State v. Coletti.*..... 523
2. Appeals—Appeal Bonds for Protection of State. The statute providing that the bond to stay judgment of conviction in misdemeanor cases shall be approved by the judge is for the protection of the state alone and not for the benefit of the defendant or his surety. *Id.*..... 523
3. Appeals—Power of Legislature to Impose Terms. It is within the power of the legislature to impose additional requirements upon the exercise of the right to appeal to the supreme court from a criminal conviction, notwithstanding the provisions of the statute which gives an appeal "as a matter of right." *Id.*..... 523
4. Arson—Expression Used by Defendant—Inferences for Jury. No error is committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used, when the situation is such that all the data from which an inference on the subject might be drawn could readily be made available to the jury. *The State v. Heitman.* 693
5. Arson—Instructions—Burden of Proof—Presumptions. On a trial for arson the instructions as a whole showed explicitly that the burden of proof was on the state, that it did not shift, and that the defendant was presumed to be innocent until the contrary was proven. *Id.*..... 693
6. "Bone-dry Law"—Information—Negative Allegations. Under the "bone-dry law" (Laws 1917, ch. 215) it is not necessary that an information should allege that the defendant was not a druggist or registered pharmacist. *The State v. Perello.* 695
7. ——— A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense. *Id.*..... 695

CRIMINAL LAW—CONTINUED:

8. **Criminal Law—Failure of Wife to Testify—Reference Thereto by County Attorney.** In a criminal action it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but, before a judgment will be reversed it must appear that some substantial right of the defendant was affected by the error. *The State v. Peterson*..... 900
9. **Criminal Prosecution—Control of County Attorney—May Dismiss Action.** While the county attorney is not required to take part in a preliminary examination in a felony case, unless requested to do so by the magistrate, if he does appear he is entitled to have full charge of the prosecution. *Foley v. Ham* ..... 66
10. **Criminal Prosecution—Refusal of Justice to Dismiss Action—Writ of Prohibition.** Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition. *Id.*..... 66
11. **Criminal Prosecutions—Unwarranted Prosecutions—Injunction.** Injunctions against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened. *Id.*, 66
12. **Detective Agent—Assaulting Suspected Criminal—Extorting Confession.** Where a detective agency authorized its representative to obtain a confession from a suspect, and in executing that authority an unlawful assault and battery is committed upon the suspect, the detective agency is liable for the damages resulting from the unlawful assault. *Mansfield v. Detective Agency* ..... 687
13. **Information—Plea of Not Guilty—Preliminary Examination—Waiver.** Where a defendant pleads not guilty to an information, without raising a question as to the sufficiency of a preliminary examination, an objection upon that ground after conviction comes too late. *The State v. Perry*..... 896
14. **Interurban Railway—Local Service in City—Control of Utilities Commission—Arrest under Void Ordinance.** Where an interurban railway operating through numerous cities extended its line into a city for local service the power to require local cars to run to a given point at specified times is by statute vested in the utilities commission, and cannot be controlled by city ordinance. *In re Wright*..... 329
15. **New Trial—Rejected Evidence—Production on Motion.** The provision of the civil code that in order to preserve for review a ruling excluding evidence the evidence must be produced at the hearing of the motion for a new trial, applies in criminal as in civil cases. *The State v. Wellman*..... 503
16. **Nonsupport of Child—Accused Absent from State—Jurisdiction of Kansas Courts.** Where a father accused of nonsupport of a child is surrendered by another state to Kansas as a fugitive from justice, the fact that the accused had not been in this state at the time of the alleged offense, nor since then, does not deprive the Kansas court of jurisdiction to try him for the offense. *Id.*..... 503
17. ——— A person who has never been in this state may under some circumstances be convicted here of a violation of the statute making it a felony for a parent, without lawful excuse to neglect or refuse to provide for the support of his children

## CRIMINAL LAW—CONTINUED:

- under the age of sixteen years who are in destitute circumstances. *Id.*..... 503
18. **Nonsupport of Child—Child Supported by Others—No Defense of Parent.** In a prosecution of a parent for nonsupport of his child, the fact that necessities of the child are being supplied by strangers is no defense. *Id.*..... 503
19. **Nonsupport of Child—Nonresident Parent—Resident Child—Statute.** Where a nonresident parent neglects to support his minor child living in this state and leaves it in necessitous circumstances he is guilty of violation of the Kansas desertion act although he is not in Kansas at the time of the alleged offense. *Id.*..... 503
20. ——— Where such nonresident of Kansas comes or is brought into this state either voluntarily or unvoluntarily he may be arrested and punished under the Kansas statute for nonsupport of his destitute child. *Id.*..... 503
21. **Preliminary Examination—Accused held for offense not Charged in Warrant.** A person arrested on a warrant based on a complaint charging one felony may be bound over for another felony shown to have been committed by the evidence adduced at the preliminary examination. *The State v. Fleeman* ..... 670
22. **Reward—Apprehending Criminal—Nonpay Deputy Sheriff May Earn Reward.** The evidence was sufficient to prove a contract to pay a reward for discovering, locating and apprehending a criminal. *Smith v. Fenner*..... 830
23. ——— The right of a public officer to claim a reward for doing his duty discussed. *Id.*..... 830
24. ——— A nonpay deputy sheriff who was under no official duty to discover and apprehend a thief is not barred by any rule of public policy from claiming a reward offered for the capture of a thief. *Id.*..... 830
25. **Robbery—Cross-examination—Improper Impeaching Questions.** In cross-examination of a witness for the purpose of impeachment it was not error to exclude previous explanation of prior contradictory statements when that explanation is not contradictory or inconsistent with his evidence on the trial. *The State v. King*..... 155
26. **Robbery—Statements of Defendant on Previous Trial—Competent.** The testimony of defendant in a criminal action given on a former trial may be introduced in evidence against him. *Id.*..... 155
27. **Robbery—Trial—Photograph Competent Evidence.** A photograph of one charged with the commission of a crime may be introduced in evidence for the purpose of corroborating a witness who identifies the one charged. *Id.*..... 155
28. **Robbery—Use of Automobile—Competent Opinion Evidence.** Where two robbers sat in their automobile in front of a store while their two companions robbed the store, the evidence of one who afterwards sat in his automobile at the same place is competent to show that the place where the crime was committed could be seen from the automobile. *Id.*..... 155
29. **Transcript from Justice's Docket—Jurisdiction of District Court.** Where the justice's transcript showed that after preliminary examination the defendant was required to and did give recognizance for his appearance in district court the

## CRIMINAL LAW—CONTINUED:

- transcript was sufficient to confer jurisdiction on the district court. *Foley v. Ham*..... 66
30. **White Slave Law—Evidence—Impeachment.** General reputation of the place described in the information was admissible. *The State v. Fleeman*..... 670
31. ——— No ground for impeaching the defendant was laid, no error was committed in striking out the answer propounded to a witness, and no error was committed in sustaining an objection to evidence. *Id.*..... 670
32. **White Slave Law—Information—Duplicity.** Under section 2 of chapter 179 of the Laws of 1913 an information is not bad for duplicity which charges a person with keeping and maintaining a place where all the immoralities named in the act are practiced and allowed. *Id.*..... 670
33. **White Slave Law—Regularly Enacted.** Chapter 179 of the Laws of 1913, commonly known as the "white slave law," was regularly enacted. *Id.*..... 670
34. **White Slave Law—Valid Information—Amendment.** A motion to quash an information drawn under the white slave law, on the ground of indefiniteness and uncertainty, considered and held the matters complained of did not affect the defendant's substantial rights. *Id.*..... 670
35. ——— An amendment of the information in a matter of form was properly allowed at the trial. *Id.*..... 670
36. ——— After the amendment the information was reverified. The reverification was unnecessary, and did not furnish ground for quashing the information. *Id.*..... 670

## CUSTOM:

1. **Benefit Insurance—Nonpayment of Dues—Forfeiture—Custom.** Where a delinquent member of a benefit association seeks to avoid a forfeiture by reliance upon a custom of accepting delinquent payments within a definite period after default he must show an offer to make payment within the limit of time as so extended. *Conroy v. Railroad Trainmen*, 757

## D.

## DAMAGES:

1. **Bridge—Defective Guard Rails—Injuries—Evidence—Findings.** In an action against a township for injuries caused by a defective guard rail on a township bridge, the evidence supported the findings of the jury, and judgment against the township cannot be disturbed. *Holcomb v. Clifton Township*, 44
2. **Compensation Act—Pain from Injuries—Right to Compensation Therefor.** Under the workmen's compensation act compensation can be recovered where inability to labor is caused by pain resulting from an injury received in an accident arising out of and in the course of the employment. *Trowbridge v. Wilson & Co.*..... 521
3. **Compromise and Settlement—Rescission—Damages as for Conversion—Petition.** In an action for damages for the conversion of goods by a bailee no error is committed in striking from his answer statements amounting to reasons for the conversion, where the facts stated constitute no legal justification. *Tire Co. v. Kirk*..... 418
4. ——— A claim for damages for malicious prosecution in a civil action held to have been properly stricken out. *Id.*..... 418

## DAMAGES—CONTINUED:

5. **Compromise and Settlement—Rescission—Measure of Damages.** Although the owner of goods in the hands of a bailee denies ownership, if the holder wrongfully sells them the measure of his liability for conversion is their value at the time of sale, although a demand for them is not made until later. *Id.*..... 418
6. **Condemnation Proceedings—Interest on Damages Sustained.** A proceeding to condemn private property for public use does not involve tort and an owner whose land is so appropriated is entitled to interest on the damages sustained by him from the time of the appropriation. *Calkins v. Railroad Co.*..... 835
7. **Damages against City—No Claim Filed in Time.** The claim for damages not having been filed with the city clerk in the time required by the statute the judgment in favor of the city must for this reason, regardless of others, be affirmed. *Griffith v. Railway Co.*..... 23
8. **Damages—Obstructing Access to City Lots—Findings—Instructions.** In an action for damages for obstructing ingress to and egress from city property certain errors in admitting proof of damages not alleged, and in submitting improper special questions to the jury, are held not to have been prejudicially erroneous. *Id.*..... 23
9. **Death in Foreign State—Action for Damages by Kansas Administrator.** An administrator appointed by a Kansas probate court has no power to maintain an action in a Kansas court to enforce a liability created by the laws of another state for the wrongful death of the intestate which occurred in such other state. *Battese v. Railroad Co.*..... 468
10. **Defective Engine—Fire Loss—Evidence—Train Records—Weight of Such Evidence.** Although the train sheets and records of a railway company show that no engine or train was operated at or near the place where a fire occurred, this court cannot weigh such evidence against evidence of other witnesses who testified that they saw an engine operating there at that time. *Smith v. Railway Co.*..... 150 .
11. **Eminent Domain—Railroad Right of Way—Elements of Damages.** In condemnation proceedings for railroad right of way injury to the remaining land resulting from the digging of borrow pits, as well as danger of seeds being carried from noxious weeds growing on the right of way, are proper elements of damages to be considered by the jury. *Schaak v. Railway Co.*..... 470
12. **Eminent Domain—Railroad Right of Way—Interest on Damages.** In condemnation proceedings the allowance of interest from a date subsequent to the appropriation of the land was not erroneous. *Craig v. Railroad Co.*..... 838
13. **Eminent Domain—Railroad Right of Way—Measure of Damages to Whole Farm.** In determining the damages to a farm resulting from a railroad right of way, no reversible error was committed in sustaining objections on cross-examination of a witness as to the value of specific tracts of the farm. *Id.*, 838
14. **Eminent Domain—Railroad Right of Way—Special Questions Refused—No Error.** In condemnation proceedings no error is committed in the refusal to require the jury to answer questions as to how much depreciation in the value of each of several tracts forming a part of the farm was caused by the appropriation of the right of way. *Id.*..... 838

DAMAGES—CONTINUED:

15. False Arrest — Damages — Petition — Necessary Allegations. Where the petition alleges that by reason of the false arrest the plaintiff's business greatly declined and was damaged in the sum of \$1,000, it is not reversible error to require the plaintiff to set out in his petition specifically and in detail how he was thus damaged. *Smith v. Hern*..... 373
16. False Arrest—Receiving Stolen Goods—Evidence of Similar Offenses. In an action to recover damages for false arrest, under a charge that the plaintiff had knowingly received feloniously stolen goods, evidence is admissible to prove that the plaintiff had on other occasions knowingly received stolen goods. *Id*..... 373
17. Joint Tort-feasors—Compromise with Part of Them. On an oral compromise with several joint *tort-feasors*, a reservation of the right to proceed against the other joint *tort-feasors* may be made orally. *Scott v. Fair Association*..... 658
18. Lease—Breach of Covenant to Repair—Damages which could be Averted. Where a landlord breaches his contract to make repairs and the tenant receives personal injuries, she will not be permitted to recover damages which could have been averted by making the repairs at slight expense on her part. *Murrell v. Crawford*..... 118
19. Lease — Breach of Covenant to Repair — Personal Injuries — Contributory Negligence. Where a tenant knows that a porch is in need of repair, but continues to use it and is injured thereby, she is guilty of contributory negligence, notwithstanding the landlord had promised to repair the porch but failed to do so. *Id*..... 118
20. Lease—Breach of Covenant to Repair—Personal Injuries—Measure of Damages. On a breach of covenant by the landlord to make repairs, the measure of damages is the difference between the rental value of the premises as they were and what it would have been if they had been put and kept in repair. *Id*..... 118
21. — The ordinary rule is that an award of damages for a landlord's breach of covenant to repair a dwelling house is not extended to include a liability for personal injuries sustained by the tenant in the use of the unrepared property. *Id*. .... 118
22. Lease—Grain Rent—Pasturing Growing Crop—Right of Landlord. Under a lease providing for a grain rent to be delivered at railway station, the landlord had no claim against his tenant for a share of the proceeds of pasturing the growing crop. *Mull v. Boyle*..... 579
- 23: — In an action by the landlord against tenants for damages done to the land by the pasturage, it is not error to instruct that they had a right to pasture the growing crop, being responsible to the owner for any resulting injury. *Id*, 579
24. Malicious Assault—Instructions—"Smart Money"—Damages—Suffering. The instructions given, none being requested by the defendant, sufficiently covered the issues between the parties and fairly stated the law. *Townsend v. Seefeld*. .... 302
25. — The findings, in accordance with the evidence of the plaintiff, convicted the defendant of such malicious and oppressive conduct as justly to render him liable to the imposition of smart money. *Id*..... 302



## DAMAGES—CONTINUED:

26. The allowance of actual damages was properly based on physical and mental suffering caused by the defendant's conduct and not alone on nervous shock. *Id.*..... 302
27. Malicious Assault—Punitive Damages—Financial Condition of Defendant. It was proper to inquire into the financial condition of the defendant to the end that the finding as to punitive damages might be intelligently made. *Id.*..... 302
28. Measure of Damages—Mental Suffering. Where a constable making a forcible and malicious levy inflicted no wound or bruise upon plaintiff, but his conduct resulted in a miscarriage accompanied with severe pain, such result could not be classed as mental as distinguished from physical suffering. *Id.*..... 302
29. Mining Coal—Subsidence of Surface—Damages—Limitation of Actions. An action for damages caused by the subsidence of the surface of land, brought about by mining coal therefrom, is not barred by the statute of limitations until two years have elapsed after the surface has subsided. *Walsh v. Fuel Co.* ..... 29
30. Mob Violence — Death — Pleadings — Evidence. In an action against a city to recover damages for a death in consequence of the action of a mob, the petition is held sufficient to state a cause of action, and the plaintiff's evidence is held sufficient as against a demurrer. *Harvey v. City of Bonner Springs* ..... 9
31. Mob Violence—Defense—Deceased Resisting Arrest—Instructions. In an action against a city for damages for a death claimed to have been caused by a mob, where the defense was that the death was caused by the unlawful resistance of the deceased to arrest by the city marshal, the issues thus raised were correctly stated in the instructions. *Id.*..... 9
32. Motorcycle — Exceeding Speed Limit — Frightening Team in Adjacent Field. Where a farmer's team hitched to a binder in a field adjoining a public highway became frightened by the noise of a motorcycle running along the highway at a rate exceeding the statutory speed limit, the driver of the motorcycle was not liable for the consequent damages. *Walker v. Faelber* ..... 646
33. Negligence—Two Acts of Negligence—Findings Sufficient. Where a jury by a special question were required to specify what particular act or acts of negligence caused the fire, an answer specifying "careless handling of the engine or defective condition of the smokestack of the engine" was, under the evidence, sufficient. *Smith v. Railway Co.*..... 150
34. Negligence—Weight of Certain Evidence—Improper Instructions. A certain instruction relative to comparative weight of the evidence of one who testified he saw an engine, and that of witnesses who testified that they did not see such engine, should not have been given. *Id.*..... 150
35. Obstructing Access to City Lots—Inconsistent Findings. In an action for damages for obstructing access to city property, one finding that the obstruction complained of rendered the street impassable and another finding that the street was passable were fatally inconsistent and contradictory. *Griffith v. Railway Co.*..... 23
36. Obstructing Access to City Lots—Joint Liability of Defendants. Under the circumstances shown the finding that one of the defendants rearranged certain railroad tracks, thereby

## DAMAGES—CONTINUED:

- obstructing travel in the street, did not relieve the other defendant from responsibility therefor. *Id.*..... 23
37. **Obstructing Street—Cause of Damages as Alleged Not Proven.** It appearing that the cement wall complained of as a barricade did not have the effect to increase the obstruction to travel, it is held that the plaintiff cannot recover on account of the erection of such wall. *Id.*..... 23
38. ——— From the location of different avenues of approach shown by the record the plaintiff is not shown to have been damaged by the rearrangement of the railroad tracks complained of. *Id.*..... 23
39. **Oil and Gas Lease—Failure to Develop—Lessor's Remedy—Damages—Forfeiture.** Where an oil lease embraced two separate tracts of land and the lessee failed to develop one of the tracts for fourteen years the lessor may recover damages for delay and the lessee may be required to develop the tract within reasonable time under penalty of forfeiture of the lease. *Alford v. Dennis* ..... 403
40. **Oil Refinery — Lawful Business — Liability for Damages to Neighbor.** The fact that the business of a refinery is in itself a lawful one and that the owner of it operates it carefully, will not exempt him from liability for casting oil, refuse and poisonous substances on the land of the plaintiff in such quantities as to cause him substantial injury. *Helms v. Oil Co.*.... 164
41. ——— The liability of the defendant in such a case is measured by the rules in relation to a nuisance instead of those governing cases of negligence. *Id.*..... 164
42. **Shipment of Cattle—Loss—Notice to Carrier.** The contract of shipment required notice of loss or injury during transportation or at loading or unloading places on the carrier's road. Held, the contract was concluded with the delivery, and notice of loss occurring after delivery was not necessary. *Ott v. Railway Co.* ..... 254
43. **Shipping Cattle — Delay in Transportation — Damages — Instructions.** In an action for damages for delay in transportation of cattle where the carrier knew of conditions likely to cause delay, and the carrier accepted the cattle for shipment without informing the shipper of such conditions, the carrier was liable for damages from the delay in the transportation. *Id.* ..... 254
44. **Tort—Photograph in Moving Picture—Rights of Privacy—Damages.** The exhibition in a moving-picture theatre of the photograph of a person taken without her consent and for the purpose of exploiting the publisher's business, is a violation of the right of privacy and entitles her to recover without proof of special damage. *Kunz v. Allen*..... 883

## DEATH:

1. **Death in Foreign State—Action for Damages by Kansas Administrator.** An administrator appointed by a Kansas probate court has no power to maintain an action in a Kansas court to enforce a liability created by the laws of another state for the wrongful death of the intestate which occurred in such other state. *Battese v. Railroad Co.*..... 468
2. **Death of Fireman—Falling from Moving Train—Assumption of Risk.** Under the federal employer's liability act where an experienced fireman, seeing his train in motion, climbed on top

## DEATH—CONTINUED:

- of a car, and while going forward over the car tops fell and was killed, he assumed the risk. *Briggs v. Railroad Co.*.... 441
3. Mob Violence—Death—Pleadings—Evidence. In an action against a city to recover damages in consequence of the action of a mob, the petition is held sufficient to state a cause of action, and the plaintiff's evidence is held sufficient as against a demurrer. *Harvey v. City of Bonner Springs*..... 9
4. Mob Violence—Death While Resisting Arrest—Good Faith of Officers Question for Jury. In an action for damages for death while deceased was resisting arrest by a marshal's posse, the questions of the good faith of the city officers, and whether the posse constituted a mob under the statute, were for the jury. *Id.*..... 9
5. ——— Under the facts stated in the opinion and under the evidence a verdict for the plaintiff against the city for \$8,500 will not be disturbed. *Id.*..... 9
6. Negligence—Street-car Track—Buggy Overturned—Death—Findings. In an action for damages for the death of a driver of a buggy occasioned by a street car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.*..... 214
7. Shipper of Stock—Dangerous Position Voluntarily Taken—Railroad Not Liable. Where a shipper of stock riding on a shipper's pass voluntarily placed himself in a position of obvious danger on the side of a moving freight car and was not engaged in looking after the stock in his charge the railroad company is not liable in an action to recover for his death. *Shore v. Railway Co.*..... 542
8. Wrongful Death—Conspiracy—Evidence. There was evidence sufficient to show a conspiracy to assault on the part of the defendants. *Berry v. Dewey*..... 593
9. ——— The instructions concerning conspiracy were fair, and they fully protected the rights of the defendant. *Id.*..... 593
10. Wrongful Death—Damages—Competent Evidence—Incompetent Evidence. In an action to recover damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person. *Id.*, 593
11. ——— A judgment will not be reversed on account of the withdrawal of evidence impeaching persons who are neither parties to the action nor witnesses therein, on matters wholly collateral, and which cannot assist the jury in determining the issues on trial. *Id.*..... 593
12. Wrongful Death—Verdict Not Excessive. In an action brought by a mother to recover for the wrongful death of her son a verdict and judgment for \$5,000 is not excessive where the deceased was 33 years old at the time of his death, was in good health and vigorous, and was accumulating property. *Id.*..... 593
13. ——— Financial benefits derived by the heir of a person who has lost his life by the wrongful act of another cannot be deducted from the damages sustained and the verdict and judgment cannot be reduced by the benefits received. *Id.*..... 593

## DEEDS:

1. Action to Compel Reconveyance—Fraud—Action Transitory. An action to compel the defendant to reconvey land claimed

**DEEDS—CONTINUED:**

- by him under a deed alleged to have been procured through his fraud, is transitory and not local, and may be brought in any county where personal service can be had upon him. *Zane v. Vawter*..... 887
2. **Deed—Breach of Warranty—Incumbrances—Mutual Mistake—Presumptions.** Where a deed contained a warranty against incumbrances the presumption is that the deed contained the agreement of the parties, but such presumption may be overcome by evidence which incontrovertibly shows that this covenant was inserted by mutual mistake. *Zuspann v. Roy*.. 188
3. **Deed by Wife—Nonjoinder of Husband—Husband's Interest Not Conveyed.** Where a wife conveyed land owned by her, without her husband joining in the deed, the land not having been a homestead nor sold for payment of debts, the husband upon the decease of his wife became absolute owner of one-half interest in such land. *Murray v. Murray*..... 184
4. ——— The plaintiff's allegation that the wife was unduly influenced was immaterial, as she could not convey his interest in the land without his consent. *Id.*..... 184
5. **Deeds In Escrow—Fraud Discovered—Rescission of Contract—Reconveyance.** Where deeds to land are deposited in escrow to await final payment, no title passes until full payment is made, and where the grantee is entitled to rescind on the ground of fraud discovered, no formal offer to reconvey the property is required. *Business Blocks Co. v. Gregory*..... 38
6. **Gift—Execution of Deed—Undue Influence—Evidence.** Evidence relating to the validity of a deed to a farm was sufficient to show that the deed was a lawful gift; that the grantor acted intelligently, independently, and of her own volition, and free from undue influence on the part of the grantee. *Golder v. Golder* ..... 486
7. **Gift—Transaction with Deceased—Deposition of Incompetent Witness—Waiver.** Where plaintiffs take the deposition of defendant who is incompetent to testify to transactions with a person since deceased, the taking of defendant's deposition by plaintiffs is a waiver of objections to his testimony and the deposition may be read in evidence on behalf of the defendant *Id.* ..... 486
8. **Mutual Mistake.** A mutual mistake in a deed conveying real property may be shown although the parties thereto did not, before it was signed, carefully examine it to ascertain whether it expressed their agreement. *Zuspann v. Roy*..... 188
9. ——— A mutual mistake in a written contract is one that is made by all the parties thereto. *Id.*..... 188

**DEMURRERS—See PLEADING AND PRACTICE.**

**DEPOSITIONS:**

1. **Gift—Transaction with Deceased—Deposition of Incompetent Witness—Waiver.** Where plaintiffs take the deposition of defendant who is incompetent to testify to transactions with a person since deceased, the taking of defendant's deposition by plaintiffs is a waiver of objections to his testimony, and the deposition may be read in evidence on behalf of the defendant. *Golder v. Golder*..... 486

**DEPUTY SHERIFFS—See REWARDS, 1-3.**

## DESCENTS AND DISTRIBUTIONS:

1. **Appeal—No Transcript of Evidence—Scope of Review.** Failure to provide a transcript of the evidence does not necessarily require the dismissal of an appeal. It merely excludes from the scope of the review those features of the lawsuit dependent thereon. *Lasnier v. Martin*..... 551
2. **Construction of Will—Evidence—Statements of Testatrix.** It is not error to exclude evidence of statements made by the testatrix to the scrivener that she wanted each of the devisees to share equally with the others. *Neil v. Stuart*..... 242
3. **Construction of Will—Interest of Devisees.** A clause in a will providing that the property is to be sold and divided "Among my Brothers & Sisters children and David R. Neil and Andrew Neil, also Lulu Keith equally" is construed to mean that the three persons last named take equally with each of the nephews and nieces per capita. *Id.*..... 242
4. **Contract—To Make Minor an Heir—Insufficient Evidence.** In an action to compel specific performance of a contract to leave all defendant's property to plaintiff the evidence did not prove the contract alleged in plaintiff's petition. *McKeown v. Carroll* ..... 826
5. **Deed by Wife—Nonjoinder of Husband—Husband's Interest Not Conveyed.** Where a wife conveyed land owned by her, without her husband joining in the deed, the land not having been a homestead nor sold for payment of debts, the husband, upon the decease of the wife, became absolute owner of one-half interest in such land. *Murray v. Murray*..... 184
6. ——— The plaintiff's allegation that the wife was unduly influenced was immaterial, as she could not convey his interest in the land without his consent. *Id.*..... 184
7. **Descents and Distributions—"Colorable" Transactions of Husband.** A colorable transaction is one presenting an appearance which does not correspond with the reality, and in the sense ordinarily contended for, an appearance intended to conceal or to deceive. *Osborn v. Osborn*..... 890
8. ——— Deeds of real estate conveying to a married man life estates and to his sons the remainders in fee, considered, and held not to be colorable. *Id.*..... 890
9. **Descents—Personal Property—Rights of Widow.** Without actual fraud in procuring a wife to join in a conveyance of her husband's land, giving her a clear right to impound the consideration received by him or to control its use, she cannot pursue the fund. *Id.*..... 890
10. ——— In order to recover under a petition claiming a widow's statutory interest in real estate, the widow must claim under the statute and through her husband. *Id.*..... 890
11. **Descents—Widow's Interest in Deceased Husband's Lands—Life Estate.** The statute giving a widow one-half in value of real estate in which her husband in his lifetime had a legal or equitable interest refers to legal or equitable interest capable of inheritance. *Id.*..... 890
12. ——— A widow has no interest, under the statute, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons" his interest being a life estate only. *Id.*..... 890
13. **Gifts—Personal Property of Husband—Right of Disposition.** A husband has unlimited power to give away his money or personal property, although the intention or known effect

## DESCENTS AND DISTRIBUTIONS—CONTINUED:

- be to deprive the wife of her statutory share should she survive him. *Id.*..... 890
14. ——— Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him unless it be definitely agreed that a specific portion shall belong to her individually. *Id.*..... 890
15. Homestead—Findings—No Abandonment. Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that she considered that city as her residence, held to imply that she intended to return to the property and occupy it as a home. *Koehler v. Gray*..... 878
16. Homestead—Taken by Eminent Domain—Rights of Heirs. Where a homestead occupied by the daughter of an intestate is taken by eminent domain, the daughter is entitled to compensation for her share of the property, and also for loss of the right to occupy the whole. *Id.*..... 878
17. Indebtedness of Heir to Ancestor—Equitable Distribution of Estate—Limitation of Actions. An indebtedness owing by an heir to his ancestor constitutes an equitable lien in favor of the estate upon such heir's distributive share of the real property belonging to the estate superior to the lien of any judgment against such heir existing at the time of the death of the ancestor. *Wilson v. Channell*..... 793
18. ——— In determining the equities between an heir who is indebted to an ancestor and the ancestor's estate the statute of limitations has no application. *Id.*..... 793
19. Oral Promise to Devise Property—Consideration—Heir's Release of Life Insurance. Where the holder of a life insurance policy desiring to collect its surrender value, induced his heir to sign a release under his oral promise to leave her at his death a certain share of his property, the release was a good consideration for the promise, and it may be enforced. *Stahl v. Stevenson*..... 447
20. Oral Promise to Devise Property—Statute of Frauds. An oral promise of an ancestor to leave at his death for a good consideration, to an heir presumptive, such share of his property as she would be entitled to under the statutes of descents and distributions is not within the statute of frauds. *Id.*.... 447
21. ——— Such a contract is not one that is not to be performed within a year, within the meaning of the statute of frauds. *Id.*..... 447
22. Oral Promise To Leave Property to Heir—Law of Wills Does Not Apply. A contract by which the obligor undertakes to make provision at his death for the obligee, although no present title to any property passes, is not required in order to be valid to be executed in accordance with the statute relating to wills. *Id.*..... 844
23. Oral Promise to Leave Property to Heir—Statute of Frauds. The provision of the statute of frauds requiring written evidence of a contract "for the sale of lands . . . or any interest in or concerning them" does not apply to all contracts which in any way concern lands. *Id.*..... 844
24. Oral Promise to Leave Property to Heir—Trust by Implication of Law—Statute. An oral promise by an ancestor for good consideration to leave at his death a share of his property to an heir presumptive impressed a trust upon his estate,

## DESCENTS AND DISTRIBUTIONS—CONTINUED:

- which trust arises by implication of law and is not forbidden by the statute. *Id.*..... 844
25. **Wife's Interest in Husband's Land—Not an Inheritance.** The wife's interest in her husband's real estate does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seizin and the marriage relation—it is no inheritance. *Murray v. Murray*..... 184, 186
26. **Will—Construction—Life Estates—Estates in Remainder—Vested Title.** Where a testator bequeaths a life estate to his widow, and the remainder undivided to his sons, the sons acquire a vested remainder in the property, and they may sell and dispose of their undivided interests. *Stevenson v. Stevenson* ..... 80
27. **Will—Perpetuities—Void Provisions—Descent of Estate.** Where a will fails because it offends against the rule of perpetuities the property thus ineffectually disposed of vests at once in the heirs at law of the deceased. *Lasnier v. Martin*, 551
28. **Wills—Rule against Perpetuities.** The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being. *Id.*..... 551
29. ——— Provisions of a will which direct that no disposition of certain property shall be made "within twenty-one years after the death of my beloved wife" are void under the rule against perpetuities. *Id.*..... 551

DESERTION AND NONSUPPORT—See PARENT AND CHILD, 2-6.

## DIVORCE AND ALIMONY:

1. **Divorce—Decree—Property Rights Determined—Res Judicata.** A final judgment in an action granting a divorce settles all property rights of the parties and is a bar to an action afterward brought by either party to determine the question of alimony, or any property rights which might have been settled by the judgment. *Heivly v. Miller*..... 313

## DRAINAGE:

1. **Drainage District—No Power over Highways or Highway Culverts.** A drainage district has no power to regulate the construction of highways or of highway culverts within the district, but such power over township highways is vested in the township board of highway commissioners. *Drainage District v. Highway Commissioners*..... 535
2. **Drainage District Supervisors—Tenure of Office—Constitutional Law.** The provision in chapter 168 of the Laws of 1911 fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the constitution forbidding the legislature to create any office the tenure of which is longer than four years. *The State, ex rel., v. Drainage District*..... 575
3. **Surface Water—Drainage—Depression—Not a Watercourse.** A depression on plaintiff's land into which surface water from defendant's land flowed in time of heavy rains was not necessarily a natural watercourse into which defendant might lawfully drain the surface waters from his land. *Evans v. Diehl*, 723
4. ——— A depression into which surface and standing waters may be drained is not necessarily a natural watercourse

**DRAINAGE—CONTINUED:**

- merely because flood waters from a neighboring river find their way into that depression when the river is in flood. *Id.*, 728
5. **Surface Water—Drainage—Injuring Neighbor's Land—Injunction.** Findings of fact on which a judgment enjoining the maintenance of a drain and ditch was based, examined and no substantial conflict discerned therein. *Id.*..... 728

**E.**

**EJECTMENT:**

1. **Adverse Possession—Payment of Taxes as Evidence.** Payment of taxes, although not a controlling circumstance, is one of the means by which ownership is asserted, and the failure to pay taxes weakens a claim of ownership by adverse possession. *Finn v. Alexander*..... 607
2. **Adverse Possession—Requisites to Obtain Title.** Title to land of another cannot be acquired by adverse possession unless the possession is open, notorious, hostile and exclusive, and of such nature that the owner may be presumed to know the occupant is claiming a title inconsistent with his own. *Id.*..... 607
3. ——— **Occupancy of land in common with the owner or with his consent and in recognition of his right is not sufficient to constitute adverse possession.** *Id.*..... 607
4. **Taxation—Defective Notice of Amount to Redeem—Voidable Tax Deed.** If in a final redemption notice to redeem from tax sale the sum stated as necessary to redeem be substantially greater than the amount, properly chargeable under the statutes a tax deed based thereon is voidable. *Jones v. Harper*... 539

**ELECTRICITY:**

1. **Uninsulated Wires—Children Playing—Injuries—Negligence Question of Fact.** Whether an electric company was guilty of negligence in permitting uninsulated wires along a street in a thickly settled portion of the city was for the jury. *Storm v. Light Co.*..... 40
2. **Uninsulated Wires—Injuries—Trial—Findings Construed.** A finding to the effect that a loose wire had been in contact with the wires of an electric light company so long that it ought to have discovered it before the occurrence of an accident was held not supported by the evidence. *Id.*..... 40
3. ——— **A finding that the company's wires would not have injured any one using the streets in a way reasonably to have been foreseen, held not to mean that the throwing of a loose wire across them could not have been anticipated by the exercise of ordinary caution.** *Id.*..... 40

**ELECTRIC RAILROADS—See RAILROADS, 1-3.**

**EMINENT DOMAIN—See CONDEMNATION PROCEEDINGS, 2, 3, 5-9.**

**ESCROW:**

1. **Deposit of Title Deeds in Escrow—Title Does Not Pass.** Where deeds of realty are deposited in escrow, to be delivered to grantee upon completion of payment therefor, title to property does not pass unless full payment is made. *Business Blocks Co. v. Gregory*..... 33

**ESTOPPEL:**

1. **Condemnation Proceedings—Warrant for Damages—Ownership—Arbitration—Estoppel.** Where a grantor to whom a county warrant for road damages was issued voluntarily sub-



**ESTOPPEL—CONTINUED:**

- mitted to the county commissioners a question at issue he is estopped from questioning the award of such arbitrators thus selected. *Lillard v. Johnson County*..... 822
2. **Fraternal Insurance—Suspension—Effect of Acceptance of Back Dues—Estoppel.** After accepting from the beneficiary the dues and assessments for the two months preceding the death of the assured and retaining them it was too late for the defendant to question the authority of the beneficiary to make the payments. *Allen v. Knights and Ladies*..... 128
3. **Homestead—Conveyance by Wife Alone—Right of Rescission by Wife—Estoppel.** Having in good faith explained to the grantees concerning the long absence of her husband the plaintiff is not estopped either by her deeds or by her conduct from maintaining this action to set aside her deed. *Thompson v. Milikin* ..... 717
4. **Judgment—Stipulation for Judgment—Estoppel to Deny Validity.** Where a stipulation for judgment signed by attorneys for both parties is used by one party to procure a continuance such party is estopped from denying that his attorney signed such stipulation without authority. *Berry v. Dewey*..... 392
5. **Oil Lease—Oral Contract—Statute of Frauds—Trusts.** Where an oil and gas lease negotiated by several lessees is made to one of them as trustee for the benefit of all, and each of the group of buyers subsequently paid his share, their claims cannot be defeated on the ground that the transaction was within the statute of frauds. *Goss v. Rothrock*..... 272
6. ——— Neither the trustee holding title for the benefit of buyers of an oil lease, nor any purchaser from him with notice, can defeat the trust on the ground that it was not created or evidenced by writing. *Id.* ..... 272
7. **Oil Lease—Sale by Trustee—Ratification by Owners—Estoppel.** Where a trustee makes a sale of an oil lease, a beneficial owner of the lease who elects to look to such trustee for his share of the purchase price thereby ratifies the sale, and is estopped from claiming title as against the purchaser at such sale. *Id.* ..... 272
8. **Written Contract—Recitals—Parol Evidence to Contradict.** A recital in a contract is not necessarily conclusive unless it operated as an inducement for the contract, or was the essence of the contract, or, having been accepted and acted upon, resulted in consequences which it would be inequitable and unjust to disturb. *Moon v. Moon*..... 737

**EVIDENCE:**

1. **Action for Damages.** In an action for fraud based on alteration of a contract, a copy of the contract which defendant's attorney had certified as correct and filed with the register of deeds, though differing from the original contract attacked by plaintiff was admissible. *Mullarky v. Manker*..... 92
2. **Alienation of Affections—Action against Parents-in-Law—Proof Required.** To support an action against parents-in-law for alienating their son's affections for his wife a much stronger and clearer case is required to be established than against a stranger. *Cooper v. Cooper*..... 378
3. **Alienation of Affections—Insufficient Evidence against Father-in-Law.** A father-in-law is not guilty of alienating his infant son's affections for his wife merely because he sends him to school after the wife has refused to live with him on account

EVIDENCE—CONTINUED:

- of non-support, and when in good faith the father sought to improve the son's earning capacity. *Id.*..... 378
4. Alienation of Affections—Insufficient Evidence against Mother-in-Law. A mother-in-law is not guilty of alienating her infant son's affections for his wife merely because she disliked the wife and expressed her belief that because of his extreme youth he was not fitted for the responsibilities and duties of a married man. *Id.*..... 378
5. Alienation of Affections—Insufficient Evidence to Sustain Judgment. Evidence examined and held insufficient to sustain a judgment in favor of plaintiff against her parents-in-law for the alienation of her husband's affections. *Id.*..... 378
6. Arson—Expression Used by Defendant—Inferences for Jury. No error is committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used, when the situation is such that all the data from which an inference on the subject might be drawn could readily be made available to the jury. *The State v. Heitman*,.... 693
7. Attorney's Lien—Elements of Value of Legal Services. Among the elements entering into the value of legal services are the character and importance of the litigation, the labor involved, the expenses incurred, the results obtained and, when such is the agreement, the success achieved. *Epp v. Hinton*... 435
8. Attorney's Lien—Value of Services—Expert Evidence—Personal Knowledge of Court. In determining the value of legal services performed by an attorney the court itself is an expert as to the value of such services when performed in his court and in addition to other evidence may apply his own knowledge and professional experience in determining their value. *Id.*..... 435
- 9 Attorney's Lien—Value of Services—Hypothetical Questions. A party may not complain of a ruling on an objection to a hypothetical question as to the value of legal services, which was not made when the evidence was offered. *Id.*..... 435
10. Bastardy — Uncontradicted Evidence — Province of Jury. A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they find to be unreliable, although it may be uncontradicted, *The State, ex rel., v. Woods*..... 499
11. Chattel Mortgage—Value of Property—Evidence—Replevin Affidavit. In a replevin action the replevin affidavit made by the plaintiff was properly admitted on the question of value of the property involved. *Bank v. Staab*..... 369
12. Construction of Will—Free from Ambiguity. The will not being ambiguous the trial court correctly refused evidence explanatory of the deviser's intentions, and properly struck from the answer allegations of what such intentions were. *Postlethwaite v. Edson*..... 104
13. Defective Engine — Fire Loss — Evidence — Train Records — Weight of Such Evidence. Although the train sheets and records of a railway company show that no engine or train was operated at or near the place where a fire occurred, this court cannot weigh such evidence against evidence of other witnesses who testified that they saw an engine operating there at that time. *Smith v. Railway Co.*..... 150

## EVIDENCE—CONTINUED:

14. Evidence—Affidavits Intended for Use on Trial—Notice to Adverse Party. Under section 350 of the civil code service of copies of affidavits intended to be used upon the trial is sufficiently made when delivered to the adverse litigant personally at his principal place of business even though that may be outside the state. *Business Blocks Co. v. Gregory*.... 33
15. False Arrest—Receiving Stolen Goods—Evidence of Similar Offenses. In an action to recover damages for false arrest under a charge that the plaintiff had knowingly received feloniously stolen goods, evidence is admissible to prove that the plaintiff had on other occasions knowingly received stolen goods. *Smith v. Hern*..... 373
16. Fraternal Insurance—Suspension—Reinstatement—Acceptance of Dues—Custom. In an action on a benefit certificate where the member had been suspended for nonpayment of dues it was not error to admit evidence of a custom of the local lodge officers to accept dues and assessments from delinquent members and thus to reinstate them. *Allen v. Knights and Ladies* ..... 128
17. Gift—Execution of Deed—Undue Influence—Evidence. Evidence relating to the validity of a deed to a farm was sufficient to show that the deed was a lawful gift; that the grantor acted intelligently, independently, and of her own volition, and free from undue influence on the part of the grantee. *Golder v. Golder*..... 486
18. Gift—Transaction with Deceased—Deposition of Incompetent Witness—Waiver. Where plaintiffs take the deposition of defendant who is incompetent to testify to transactions with a person since deceased, the taking of defendant's deposition by plaintiffs is a waiver of objections to his testimony and the deposition may be read in evidence on behalf of the defendant. *Id*..... 486
19. Hail Insurance—Incompetent Evidence of Amount of Loss. In an action for loss under a hail insurance contract the admission of evidence of amounts paid by the insurance company to other persons in settlement of losses to wheat crops occasioned by the same hailstorm was error. *Williams v. Insurance Co*..... 74
20. Life Insurance—Physical Appearance of Applicant—Evidence. Testimony of neighbors as to the physical appearance of insured was properly received touching his good faith in making the statements contained in the application. *Sharrer v. Insurance Co*..... 650
21. Moving Pictures—Presumption—Judicial Action. Without allegation or proof that the Kansas board of review acted arbitrarily or dishonestly in disapproving a motion-picture film, it must be presumed that it acted in good faith and in the honest exercise of its best judgment. *Photo Play Corporation v. Board of Review*..... 356
22. Negligence—Weight of Certain Evidence—Improper Instructions. A certain instruction relative to comparative weight of the evidence of one who testified he saw an engine, and that of witnesses who testified that they did not see such engine, should not have been given. *Smith v. Railway Co*..... 150
23. Parol Evidence—Dishonored Draft—Relation of Bank and Depositor. Parol evidence is competent in an action by a bank against a depositor for the amount of a dishonored draft to

**EVIDENCE—CONTINUED:**

- show the relationship of the parties and the conditions of the deposit. *Bank v. Schaefer*..... 868
24. **Promissory Note—Mistake—Signed as Maker—Intended as Indorser—Proof.** Where no rights of holders in due course or of other innocent parties without notice are involved, it may be established by clear, decided and satisfactory proof that the signing of a promissory note as maker was a mistake and the signing as an indorser was intended. *Rodgers v. Slavens*..... 1
25. **Robbery—Statements of Defendant on Previous Trial—Competent.** The testimony of defendant in a criminal action given on a former trial may be introduced in evidence against him. *The State v. King*..... 155
26. **Robbery—Trial—Photograph Competent Evidence.** A photograph of one charged with the commission of a crime may be introduced in evidence for the purpose of corroborating a witness who identifies the one charged. *Id.*..... 155
27. **Robbery — Use of Automobile — Competent Opinion Evidence.** Where two robbers sat in their automobile in front of a store while their two companions robbed the store, the evidence of one who afterwards sat in his automobile at the same place, is competent to show that the place where the crime was committed could be seen from the automobile. *Id.*..... 155
28. **Stipulations—Motion for Judgment—Estoppel.** On a motion for judgment on a stipulation where the defense is that it was not signed by the defendants, but by an attorney not authorized, an application for a continuance of the action sworn to by defendant's attorney referring to the stipulation as a ground for continuance is admissible. *Berry v. Dewey*..... 392

**EXCHANGE OF PROPERTY:**

1. **Agent's Commission — Exchange of Property — Evidence — Findings.** There was evidence sufficient to compel the submission of the defense to the jury and to sustain the verdict and judgment for the defendants. *Avery v. Howell*..... 527
2. ——— There was evidence which tended to support each of the findings of fact made by the jury. *Id.*..... 527
3. **Agent's Commissions — Shifting Ground of Defense.** In an action to recover an agent's commission on an exchange of property the evidence tended to prove the ground for defendants' refusal to make the exchange as stated by them before action was begun. *Id.*..... 527
4. **Exchange of Property — Evidence for Jury.** The evidence in support of the counterclaim examined, and held sufficient to warrant its submission to the jury. *McKenna v. Morgan*.... 478
5. **Exchange of Property—False Representations—Not Expression of Opinion.** The representation was that a stock of merchandise contained certain goods invoiced at cost, to amount with certain articles of agreed value to a certain sum. Held, the representation was not a mere expression of opinion as to value. *Id.*..... 478
6. **Exchange of Property—Fraudulent Representations—Statute of Limitations.** Where in an exchange of property plaintiff sought to recover for shortage in land, and defendant counterclaimed for shortage in quantity of stock of merchandise he received, section 6994 of the General Statutes of 1915 prevents application of the statute of limitations to the cross demand. *Id.*..... 478

## EXCHANGE OF PROPERTY—CONTINUED:

7. **Exchange of Property—Payments on Contract—No Waiver of Fraud.** Where a counterclaim was based on fraudulent representation of the quantity of goods in an exchange of property the right to recover for the fraud was not defeated by making payments and otherwise recognizing the obligation of the contract. *Id.*..... 478
8. **Exchange of Property—Relief on the Ground of Fraud—Evidence.** In an action for relief on the ground of fraud the evidence held to have been sufficient to warrant submitting to the jury the matter on which the verdict was based. *Mullarky v. Manker* ..... 92

## EXECUTIONS:

1. **Mortgage Foreclosure—Sale—Confirmation—Sheriff's Deed—Attack—Homestead.** Where no appeal has been taken from a decree of confirmation of a sheriff's sale, mere irregularities of the sheriff's sale afford no basis for an attack upon the sheriff's deed issued in pursuance of such confirmation. *Catlin v. Deering & Co.*..... 256
2. ——— Nor can such deed be attacked on the ground that the land sold was occupied as a homestead and therefore exempt from sale on a general execution. *Id.*..... 256
3. **Mortgage Foreclosure—Sheriff's Sale—Valid Order of Sale—Void Execution.** A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final the title of the purchaser is not open to attack on the ground of the invalidity of the execution. *Id.*..... 256

## EXECUTORS AND ADMINISTRATORS:

1. **Administrator—Order of Probate Court—Appeal by Administrator—Appeal Bond Required.** An administrator who appeals to the district court from an order of the probate court which charges him with interest on certain funds, deducts the interest charges from an allowance of compensation previously made, and directs distribution of the estate, is required to give an appeal bond. *Elliott v. Baird.*..... 317
2. **Claim against Estate—Proof—Demand Increased by Amendment.** Where parties are required to itemize their claim against an estate, no prejudice resulted by including in their amended demand a list of items in excess of the amount of their original demand. *Dubbs v. Haworth.*..... 603
3. **Claim against Estate—Statute of Limitations.** Where two persons jointly perform services for another, "which services were to be paid for by the recipient thereof, "after she was through with her property," a demand against the latter's estate after her death, if timely made, is not affected by the statute of limitations. *Id.*..... 603
4. **Contract of Employment—Proof of Claim against Estate—Verification.** Where pursuant to a single contract two persons jointly perform services for another since deceased, the affidavit of one of the joint performers is a sufficient verification of the proof of claim against the estate of the employer. *Id.* ..... 603
5. ——— Where the administrator's objection to such affidavit was too obscure, to apprise the court of the specific nature of any defect therein, the defect, if any, will be deemed waived. *Id.* ..... 603

**EXECUTORS AND ADMINISTRATORS—CONTINUED:**

6. **Death in Foreign State—Action for Damages by Kansas Administrator.** An administrator appointed by a Kansas probate court has no power to maintain an action in a Kansas court to enforce a liability created by the laws of another state for the wrongful death of the intestate which occurred in such other state. *Battese v. Railroad Co.*..... 468

**EXEMPTIONS:**

1. **Homestead—Death of Parents—Exempt to Unmarried Daughter.** Property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death intestate of himself and his wife, so long as an unmarried daughter of full age who had lived with him as a part of his family continues her residence thereon without interruption. *Koehler v. Gray.*..... 878
2. **Homestead—Findings—No Abandonment.** Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that she considered that city as her residence, held to imply that she intended to return to the property and occupy it as a home. *Id.*..... 878
3. **Homestead—Taken by Eminent Domain—Rights of Heirs.** Where a homestead occupied by the daughter of an intestate is taken by eminent domain, the daughter is entitled to compensation for her share of the property, and also for loss of the right to occupy the whole. *Id.*..... 878

**EXTRADITION:**

1. **Fugitive from Justice—Illegal Extradition—Jurisdiction of Kansas Courts.** Where the governor of a foreign state without legal authority causes the arrest of a Kansas fugitive from justice, and such fugitive is extradited and brought into Kansas, he may be tried in a Kansas court notwithstanding the want of any illegal authority for his extradition. *The State v. Wellman.*..... 503
2. **Nonsupport of Child—Accused Absent from State—Jurisdiction of Kansas Courts.** Where a father accused of nonsupport of a child is surrendered by another state to Kansas as a fugitive from justice, the fact that the accused had not been in this state at the time of the alleged offense, nor since then, does not deprive the Kansas court of jurisdiction to try him for the offense. *Id.*..... 503
3. ——— A person who has never been in this state may under some circumstances be convicted here of a violation of the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his children under the age of sixteen years who are in destitute circumstances. *Id.*..... 503

**F.**

**FACTORY ACT:**

1. **Factory Act—Compromise by Widow—Rights of Infant Child.** A cause of action for the death of a workman, arising under the factory act, may not be compromised by the widow to the prejudice of an infant child entitled to share in the damages recoverable. *Jeffries v. Elevator Co.*..... 811
2. **Factory Act—Death—Widow May Maintain Action.** When no personal representative has been appointed a widow may maintain an action under the factory act for the death of her husband. *Id.*..... 811

## FACTORY ACT—CONTINUED:

3. **Factory Act—Grain Elevator “A Factory.”** A grain elevator, wherein grain coming from the farm in a raw state or condition is converted into an improved form by the processes of elevating, drying, cleaning, and mixing, is a factory, within the meaning of the factory act. *Id.*..... 811

## FALSE ARREST:

1. **False Arrest—Damages—Petition—Necessary Allegations.** Where the petition alleges that by reason of the false arrest the plaintiff's business greatly declined and was damaged in the sum of \$1,000, it is not reversible error to require the plaintiff to set out in his petition specifically and in detail how he was thus damaged. *Smith v. Hern.*..... 373
2. **False Arrest—Officer May Arrest without a Warrant.** An officer may arrest a person without a warrant where the officer has reasonable grounds to believe that a felony has been committed by the person arrested. *Id.*..... 373
3. **False Arrest—Receiving Stolen Goods—Evidence of Similar Offenses.** In an action to recover damages for false arrest under a charge that the plaintiff had knowingly received feloniously stolen goods, evidence is admissible to prove that the plaintiff had on other occasions knowingly received stolen goods. *Id.*..... 373

## FEDERAL EMPLOYER'S LIABILITY ACT:

1. **Death of Fireman—Falling from Moving Train—Assumption of Risk.** Under the federal employer's liability act where an experienced fireman seeing his train in motion climbed on top of a car, and while going forward over the car tops fell and was killed, he assumed the risk. *Briggs v. Railroad Co.*..... 441

## FEES:

1. **Chiropractic Examiners—Fees Go to State Treasurer in Official Capacity.** Section 10 of chapter 291 of the Laws of 1913 requires the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board. *Robb v. Knapp.*..... 898

## FINDINGS OF FACT—See REFERENCES, 3.

## FIRE—See RAILROADS, 10, 29.

## FORFEITURE—See CONTRACTS, 54, 56.

## FRATERNAL INSURANCE—See INSURANCE, 18-22.

## FRAUD:

1. **Agency—Commissions—Fraud—Separate Trials—Burden of Proof.** In an action by a real-estate agent for commissions where the question of fraud was involved there was no abuse of discretion in refusing separate trials of the issues. *Prather v. Eden.*..... 545
2. ——— The burden of proving fraud was properly placed on the party alleging it. *Id.*..... 545
3. ——— There was no error respecting instructions or in refusing a new trial. *Id.*..... 545
4. **Attachment—Bill of Sale—Not Fraudulent.** Where a debtor while solvent gave her note to attorneys to defend her sons in criminal actions pending against them, and gave a bill of sale of personal property to a third party to procure additional

## FRAUD—CONTINUED:

- security for the payment of such fees, the bill of sale was not fraudulent as to creditors. *Bank v. Greene*..... 202
5. Attachment—Bill of Sale—Security for Future Advances—Not Fraudulent. Where a bill of sale was given to secure an existing debt and for indefinite future outlays of money for the support of the debtor until her finances mended, the inclusion of future advances did not, of necessity, render the bill of sale fraudulent. *Id.*..... 202
6. Attachment—Bill of Sale—To Secure Attorney's Fees—Good Faith. Where attorneys are employed to represent accused persons in specified criminal actions then pending they can take and hold security for their fees given in good faith and not as a ruse to hinder, delay or defraud creditors. *Id.*..... 202
7. Bank as Loan Agent—Taking Worthless Securities—Fraud. The record justified the conclusion that the defendant bank acted as the agent of the plaintiff in loaning the money sued for herein. *Allen v. Bank*..... 592
8. ——— The petition set forth conduct clearly fraudulent without using that particular adjective. Held, that it was proper to instruct on the fraud thus alleged. *Id.*..... 592
9. ——— The evidence tended to show that the bank profited by the transaction. *Id.*..... 592
10. Deeds in Escrow—Fraud Discovered—Rescission of Contract—Reconveyance. Where deeds to land are deposited in escrow to await final payment, no title passes until full payment is made, and where the grantee is entitled to rescind on the ground of fraud discovered, no formal offer to reconvey the property is required. *Business Blocks Co. v. Gregory*..... 33
11. Evidence—Question for Jury. In an action for fraud by alteration of a written contract relating to the exchange or transfer of property, evidence held sufficient to warrant submission of the question to a jury. *Mullarky v. Manker*..... 92
12. Exchange of Property—False Representations—Not Expression of Opinion. The representation was that a stock of merchandise contained certain goods invoiced at cost, to amount with certain articles of agreed value to a certain sum. Held, the representation was not a mere expression of opinion as to value. *McKenna v. Morgan*..... 478
13. Exchange of Property—Fraudulent Representations—Statute of Limitations. Where in an exchange of property plaintiff sought to recover for shortage in land, and defendant counterclaimed for shortage in quantity of stock of merchandise he received, section 6994 of the General Statutes of 1915 prevents application of the statute of limitations to the cross demand. *Id.*..... 478
14. Exchange of Property—Payments on Contract—No Waiver of Fraud. Where a counterclaim was based on a fraudulent representation of the quantity of goods exchanged the right to recover on such counterclaim was not defeated by making payments and otherwise recognizing the obligation of the contract. *Id.*..... 478
15. Exchange of Property—Relief on the Ground of Fraud—Evidence. In an action for relief on the ground of fraud the evidence held to have been sufficient to warrant submitting to the jury the matter on which the verdict was based. *Mullarky v. Manker* ..... 92
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## FRAUD—CONTINUED:

16. **Injuries to Minor Son—Compromise by Father—Judgment by Consent—Parent's Authority.** Where a minor had sustained personal injuries which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries, notwithstanding the settlement negotiated by his father. *Leslie v. Manufacturing Co.*..... 159
17. ——— **An inadequate settlement by a father for injuries to his minor son does not bar an action by the son for such injuries on attaining his majority, although the father consented to a formal judgment therefor in a city court.** *Id.*.... 159
18. **Joint Tort-feasors—Damages—Contribution.** It is a general rule that where one of several joint tort-feasors is compelled to pay damages for the joint wrong of all he cannot enforce contribution or secure reimbursement from any of the other tort-feasors. *Rucker v. Allendorph.*..... 771
19. **Mortgage Foreclosure—Personal Service—Default Judgment—Jurisdiction.** In a foreclosure action the district court has jurisdiction to render judgment by default, on personal service, without the notes and mortgage sued on being filed with the clerk or presented to the court. *Broquet v. Mosier.*.... 246
20. ——— **It is not a fraud on the defendants in a foreclosure action for the plaintiff to fail to file with the clerk or to present to the court the notes and mortgage sued on, or to introduce any evidence in support of the petition, where personal service has been made and judgment is rendered by default.** *Id.*..... 246
21. **Note—Relationship of Parties—Presumption of Fraud.** Failure of consideration and fraudulent purpose in the giving of a note and chattel mortgage will not be presumed because of the relationship of the parties. *Grisier v. Bank.*..... 7
22. **Sewer Contract—Indemnity Bond—Judgment against Contractor—Surety's Liability.** A judgment against a sewer contractor for overpayments induced by fraudulent measurements is *prima facie* evidence of the amount of the surety company's indebtedness on account of such overpayments. *City of Topeka v. Ritchie.*..... 384

## FRAUDS, STATUTE OF

1. **Contract—Lease—Improvements—Limitation of Actions—Statute of Fraud.** Where the time fixed for the payment of an oral obligation might have arrived within one year, and the promisee had fully performed his part, the statute of limitations did not begin to run until the obligation matured, and the obligation was not repugnant to the statute of frauds. *Henshaw v. Smith.*..... 599
2. **Contract to Execute Oil and Gas Lease—Within Statute of Frauds.** A contract to execute an oil and gas lease granting the right to explore, and, if mineral be found, to produce and sever, is a contract for the sale of an incorporeal hereditament, within the meaning of the sixth section of the statute of frauds. *Robinson v. Smalley.*..... 842
3. ——— **A contract by a husband, whereby for a consideration he agrees to procure his wife to sign an oil and gas lease of the character described, need not be in writing to be actionable.** *Id.*..... 842
4. **Oil Lease—Oral Contract—Statute of Frauds—Trusts.** Where an oil and gas lease negotiated by several lessees is made to

**FRAUDS, STATUTES OF—CONTINUED:**

- one of them as trustee for the benefit of all, and each of the group of buyers subsequently paid his share, their claims cannot be defeated on the ground that the transaction was within the statute of frauds. *Goss v. Rothrock*..... 272
5. ——— Neither the trustee holding title for the benefit of buyers of an oil lease, nor any purchaser from him with notice, can defeat the trust on the ground that it was not created or evidenced by writing. *Id.*..... 272
6. **Oral Promise to Devise Property—Consideration—Heir's Release of Life Insurance.** Where the holder of a life insurance policy desiring to collect its surrender value, induced his heir to sign a release under his oral promise to leave her at his death a certain share of his property, the release was a good consideration for the promise, and it may be enforced. *Stahl v. Stevenson*..... 447
7. **Oral Promise to Devise Property—Statute of Frauds.** An oral promise of an ancestor to leave at his death for a good consideration to an heir presumptive such share of his property as she would be entitled to under the statutes of descents and distributions is not within the statute of frauds. *Id.*..... 447
8. ——— Such a contract is not one that is not to be performed within a year, within the meaning of the statute of frauds. *Id.*..... 447
9. **Oral Promise to Leave Property to Heir—Statute of Frauds.** The provision of the statute of frauds requiring written evidence of a contract "for the sale of lands . . . or any interest in or concerning them" does not apply to all contracts which in any way concern lands. *Id.*..... 844
10. **Oral Promise to Leave Property to Heir—Trust by Implication of Law—Statute.** An oral promise by an ancestor for good consideration to leave at his death a share of his property to an heir presumptive impressed a trust upon his estate, which trust arises by implication of law and is not forbidden by the statute. *Id.*..... 844
11. **Written Order to Pay Debt of Another—No Binding Contract.** A written order by an employee to his employer to pay his creditor a sum of money does not create a liability against the employer and in favor of the creditor unless the employer agrees to make such payment. *Emerson-Brantingham Co. v. Lyons* ..... 733

**FRAUDULENT REPRESENTATIONS—See FRAUD, 12-14.**

G.

**GASOLINE—See NEGLIGENCE, 16, 45, 46.**

**GIFTS:**

1. **Gift—Execution of Deed—Undue Influence—Evidence.** Evidence relating to the validity of a deed to a farm was sufficient to show that the deed was a lawful gift; that the grantor acted intelligently, independently, and of her own volition, and free from undue influence on the part of the grantee. *Golder v. Golder* ..... 486

**GUARANTY AND SURETYSHIP:**

1. **Indemnity Bond—Bank Cashier—Fraud—Loss—Bond Constructed.** In an action on a surety bond indemnifying a bank against loss occasioned by fraud or dishonesty of its cashier

## GUARANTY AND SURETYSHIP—CONTINUED:

- "amounting to embezzlement or larceny" the plaintiff may recover without technical proof of fraudulent acts as required in criminal prosecutions for embezzlement or larceny. *Bank v. Colton* ..... 365
2. Indemnity Bond—"Notice of Loss" Not Given—Waiver. In action to recover on an indemnity bond the failure of the plaintiff to give "immediate notice" of the loss as provided in the bond was waived by the conduct of the surety company in placing its denial of liability upon other distinct grounds. *Id.* ..... 365
3. Note—Indorsements—Negotiability Not Destroyed. A note signed by joint makers containing this language: "We, the makers, sureties, endorers and guarantors of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof to any of the sureties of this note" is negotiable. *Bank v. Dickinson* ..... 564
4. ——— There was nothing on such note to indicate that any party thereto was a surety, and the quoted sentence was meaningless and did not render the instrument a courier impeded with luggage. *Id.* ..... 564
5. Sewer Contract—Breach—Damages—Surety—Limitation of Actions. In an action by a city against a surety of a contractor to recover costs and expenses incurred and paid by reason of the contractor's misfeasance, costs which accrued and were paid by the city within five years before the action was begun were not barred as to the surety company. *City of Topeka v. Ritchie* ..... 384
6. Sewer Contract—Fraud—Judgment—Action against Surety—Limitation of Actions. While the statute of limitations as to the contractor had run on the overpayments as a cause of action, an action on the judgment was not barred as to such contractor. *Id.* ..... 384
7. ——— When the overpayments were made, the cause of action to recover them accrued in favor of the city against the principal and surety and an action against the latter on its bond by reason of such overpayments became barred in five years. *Id.* ..... 384
8. ——— Each count of the fifth amended petition states a cause of action in respect to all items contained therein which did not accrue more than five years before the beginning of this action. *Id.* ..... 384
9. Sewer Contract—Indemnity Bond—Judgment against Contractor—Surety's Liability. A judgment against a sewer contractor for overpayments induced by fraudulent measurements is *prima facie* evidence of the amount of the surety company's indebtedness on account of such overpayments. *Id.*, 384

## GUARDIAN AND WARD:

1. Compensation Act—Injury to Minor—Presentation of Claim—Statute of Limitations. The action of a minor by his next friend to recover under the workmen's compensation act is not barred because the written claim for compensation was not served within three months from the date of the injury—no guardian having been appointed. *Minturn v. Manufacturing Co.* ..... 885

GUARDIAN AND WARD—CONTINUED:

3. **Insane Persons—Guardian May be Appointed without Notice.**  
A probate court may without notice appoint a successor to a guardian for a lunatic, who has been duly adjudged to be a person of unsound mind, confined in a state hospital, and discharged therefrom as improved. *Ekblad v. Linderholm*... 8
4. **Mandamus—Insane Person—Conducting his Own Litigation.**  
A person who has been adjudged insane and who is under guardianship cannot conduct litigation without the supervision, control and protection of his guardian. *Linderholm v. Walker* ..... 684
5. ——— **When it clearly appears that a person who has been adjudged insane is the plaintiff in an action and that he is seeking to maintain that action independent of his guardian and without the approval of the latter, the action should be dismissed.** *Id.*..... 684

H.

HABEAS CORPUS:

1. **Interurban Railway—Local Service in City—Control of Utilities Commission—Arrest under Void Ordinance.** Where an interurban railway operating through numerous cities extended its line into a city for local service, the power to require local cars to run to a given point at specified times is by statute vested in the utilities commission, and cannot be controlled by city ordinance. *In re Wright*..... 829

HIGHWAYS:

1. **Bridge—Defective Guard Rails—Injuries—Evidence—Findings.** In an action against a township for injuries caused by a defective guard rail on a township bridge, the evidence supported the findings of the jury, and judgment against the township cannot be disturbed. *Holcomb v. Clifton Township*, 44
2. **Drainage District—No Power over Highways or Highway Culverts.** A drainage district has no power to regulate the construction of highways or of highway culverts within the district, but such power over township highways is vested in the township board of highway commissioners. *Drainage District v. Highway Commissioners*..... 585
3. **Heavy Vehicles—Planking Bridges—Statute Includes Horse-drawn Wagons.** Section 8799 of the General Statutes of 1915, providing that drivers of certain heavy vehicles on a public highway shall plank all bridges and culverts before driving across them, applies to and includes horse-drawn wagons. *White v. Kansas City*..... 495
4. **Motorcycle—Exceeding Speed Limit—Frightening Team in Adjacent Field.** Where a farmer's team hitched to a binder in a field adjoining a public highway became frightened by the noise of a motorcycle running along the highway at a rate exceeding the statutory speed limit, the driver of the motor cycle was not liable for the consequent damages. *Walker v. Faelber*..... 646
5. **Motorcycle—Operation on Highway—Construction of Statute.** Chapter 65 of the Laws of 1913, making it unlawful for any person to operate a motorcycle on a public highway at a greater rate of speed than twenty-five miles per hour was intended solely for the protection of others using such highway. *Id.*..... 646

**HIGHWAYS—CONTINUED:**

6. **Negligence—Injuries—Proximate Cause—Question for Jury.** Negligence to be the proximate cause of an injury must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. *Walmsley v. Telephone Association* ..... 139
7. **Negligence—Telephone Wires—Injuries—Prima Facie Case—Burden of Proof.** Where a plaintiff has proved that he sustained injuries through the dangerous situation of a telephone wire hanging across a public highway, the burden passes to the telephone company to show facts excusing the dangerous condition of the highway. *Id.* ..... 139
8. **Negligence—Trial—No Prejudicial Error in Record.** The record, in an action to recover damages for personal injuries sustained through the negligent maintenance of a telephone wire across a public highway, examined, and no prejudicial error discerned therein. *Id.* ..... 139
9. **Telephone Wire over Highway—Injuries—Evidence.** Negligence in the maintenance of a telephone wire across a public highway is sufficiently established when it is shown that the wire hung so low as to interfere with the customary use of the highway. *Id.* ..... 139

**HOMESTEAD:**

1. **Construction of Will—Life Estate—Remainders—Judgment Liens—Homestead.** Under a joint will executed by husband and wife, the wife, as survivor, took a life estate with power of disposition, and upon her failure to make disposition during life the children took the remainder subject to a judgment lien against the husband. *Postlethwaite v. Edson* ..... 104
2. ——— The homestead character of real estate depends upon family occupancy—not on the source of title. *Id.* ..... 104
3. **Homestead—Conveyance by Wife Alone—Rights of Rescission by Wife—Estoppel.** Having in good faith explained to the grantees concerning the long absence of her husband the plaintiff is not estopped either by her deeds or by her conduct from maintaining this action to set aside her deed. *Thompson v. Millikin* ..... 717
4. **Homestead—Conveyance by Wife Alone—Void—Absence of Husband.** The title to a homestead being in the wife, who remained in possession with her children, the homestead character was not destroyed or impaired by the voluntary absence of the husband. *Id.* ..... 717
5. ——— The instruments relied on by the defendants affecting the plaintiff's homestead are void because executed by her alone, the husband not joining therein or consenting thereto. *Id.* ..... 717
6. **Homestead—Death of Parents—Exempt to Unmarried Daughter.** Property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death intestate of himself and his wife, so long as an unmarried daughter of full age who had lived with him as a part of his family continues her residence thereon without interruption. *Koehler v. Gray* ..... 878
7. **Homestead—Findings—No Abandonment.** Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that

## HOMESTEAD—CONTINUED:

- she considered that city as her residence, held to imply that she intended to return to the property and occupy it as a home. *Id.*..... 878
8. Judgment against Testator—Lien on Testator's Interest in Land. In an action by a judgment creditor against the estate of the judgment debtor only the actual interest of the judgment debtor in property can be appropriated. *Postlethwaite v. Edson* ..... 104
9. Lease and Contract Not Signed by Wife—Void. Where a husband and wife occupy land as their homestead, any contract affecting the title and right of possession thereto made by the husband and not signed by the wife is absolutely void. *Walz v. Keller* ..... 124
10. — Although the homestead may be sold for the payment of obligations contracted for its purchase, the purchaser and his wife are not precluded from defending the homestead right as against actions brought by the seller based on void contracts. *Id.*..... 124
11. Mortgage Foreclosure—Sale—Confirmation—Sheriff's Deed—Attack—Homestead. Where no appeal has been taken from a decree of confirmation of a sheriff's sale mere irregularities of the sheriff's sale afford no basis for an attack upon the sheriff's deed issued in pursuance of such confirmation. *Catlin v. Deering & Co.* ..... 256
12. — Nor can such deed be attacked on the ground that the land sold was occupied as a homestead and therefore exempt from sale on a general execution. *Id.*..... 256
13. Mortgage Foreclosure—Sheriff's Sale—Valid Order of Sale—Void Execution. A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final the title of the purchaser is not open to attack on the ground of the invalidity of the execution. *Id.*..... 256
14. Occupied by Widow Alone—Not Subject to Partition. A homestead occupied by a childless testator and his wife, and thereafter occupied by his widow, who elects to take under the law, cannot be partitioned without her consent at the suit of collateral heirs. *Breen v. Breen.*..... 766
15. Occupied by Wife and Children—Effect of Husband Acquiring Another Homestead. The fact that a husband deserted his family and acquired another homestead in Oregon did not have the effect to deprive him of his husband's interest in the Kansas homestead occupied by his wife and children so as to validate conveyances thereof made by his wife alone. *Thompson v. Millikin.*..... 717
16. Taken by Eminent Domain—Rights of Heirs. Where a homestead occupied by the daughter of an intestate is taken by eminent domain, the daughter is entitled to compensation for her share of the property, and also for loss of the right to occupy the whole. *Koehler v. Gray.*..... 878
17. Wills—Devise of Homestead—Rights of General Creditors. "Creditors," as the expression is used in section 11752 of the General Statutes of 1915 concerning wills, means and includes general creditors. *Postlethwaite v. Edson.*..... 619
18. — Where a judgment debtor by will devised his homestead to a devisee who never occupied the land, such devisee took the land subject to the rights of the judgment creditors of the testator. *Id.*..... 619

## HOUSE CONCURRENT RESOLUTION—See CONSTITUTIONAL LAW, 5.

## HUSBAND AND WIFE:

1. Alienation of Affections—Action against Parents-in-law—Proof Required. To support an action against parents-in-law for alienating their son's affections for his wife, a much stronger and clearer case is required to be established than against a stranger. *Cooper v. Cooper*..... 378
2. Alienation of Affections—Duty of Parents toward Son's Wife. The parents of a nineteen-year-old son owe no legal duty toward that son's wife, except not to meddle intentionally with their son's affections for his wife. *Id.*..... 378
3. Alienation of Affections—Insufficient Evidence against Father-in-law. A father-in-law is not guilty of alienating his infant son's affections for his wife merely because he sends him to school after the wife has refused to live with him on account of nonsupport, and when in good faith the father sought to improve the son's earning capacity. *Id.*..... 378
4. Deed by Wife—Nonjoinder of Husband—Husband's Interest Not Conveyed. Where a wife conveyed land owned by her, without her husband joining in the deed, the land not having been a homestead nor sold for payment of debts, the husband upon the decease of the wife, became absolute owner of one-half interest in such land. *Murray v. Murray*..... 184
5. ——— The plaintiff's allegation that the wife was unduly influenced was immaterial, as she could not convey his interest in the land without his consent. *Id.*..... 184
6. Descents and Distributions—Action by Widow—Insufficient Allegations. The petition considered and held to contain no allegation of a contract whereby, in consideration of the surrender of the wife's marital interest in land sold by her husband, he agreed to invest her with a substantial marital interest in other land. *Osborn v. Osborn*..... 890
7. ——— The petition considered, and held not to charge the husband with perpetrating a fraud on his wife with respect to the surrender of her marital interest in land belonging to him which he sold. *Id.*..... 890
8. Descents and Distributions—"Colorable" Transaction of Husband. A colorable transaction is one presenting an appearance which does not correspond with the reality, and in the sense ordinarily contended for, an appearance intended to conceal or to deceive. *Id.*..... 890
9. ——— Deeds of real estate conveying to a married man life estates, and to his sons the remainders in fee, considered, and held not to be colorable. *Id.*..... 890
10. Descents—Personal Property—Rights of Widow. Without actual fraud in procuring a wife to join in a conveyance of her husband's land, giving her a clear right to impound the consideration received by him or to control its use, she cannot pursue the fund. *Id.*..... 890
11. ——— In order to recover under a petition claiming a widow's statutory interest in real estate, the widow must claim under the statute and through her husband. *Id.*..... 890
12. Descents—Widow's Interest in Deceased Husband's Lands—Life Estate. The statute giving a widow one-half in value of real estate in which her husband in his lifetime had a legal or equitable interest refers to legal or equitable interest capable of inheritance. *Id.*..... 890

## HUSBAND AND WIFE—CONTINUED:

13. ——— A widow has no interest, under the statute, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons," his interest being a life estate only. *Id.* ..... 890
14. **Gifts—Personal Property of Husband—Right of Disposition.** A husband has unlimited power to give away his money or personal property, although the intention or known effect be to deprive the wife of her statutory share should she survive him. *Id.* ..... 890
15. ——— Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him unless it be definitely agreed that a specific portion shall belong to her individually. *Id.* ..... 890
16. **Homestead—Conveyance by Wife Alone—Right of Rescission by Wife—Estoppel.** Having in good faith explained to the grantees concerning the long absence of her husband the plaintiff is not estopped either by such instruments or by her conduct from maintaining this action to set aside her deed. *Thompson v. Millikin* ..... 717
17. **Homestead—Conveyance by Wife Alone—Void—Absence of Husband.** The title to a homestead being in the wife, who remained in possession with her children, the homestead character was not destroyed or impaired by the voluntary absence of the husband. *Id.* ..... 717
18. ——— The instruments relied on by the defendants, affecting the plaintiff's homestead, are void because executed by her alone, the husband not joining therein or consenting thereto. *Id.* ..... 717
19. **Homestead—Occupied by Wife and Children—Effect of Husband Acquiring Another Homestead.** The fact that a husband deserted his family and acquired another homestead in Oregon did not have the effect to deprive him of his husband's interest in the Kansas homestead occupied by his wife and children so as to validate conveyances thereof made by his wife alone. *Id.* ..... 717
20. **Wife's Interest in Husband's Land—Not an Inheritance.** The wife's interest in her husband's real estate does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seizin and the marriage relation. It is not an inheritance. *Murray v. Murray*, .... 184, 186

## I.

## ILLEGITIMATE CHILDREN:

1. **Bastardy — Instructions — Presumption of Innocence.** In an action for bastardy it was not error to instruct the jury that defendant is presumed to be innocent of the charge against him until overcome by a preponderance of the credible evidence showing that he is the father of the child. *The State, ex rel., v. Woods* ..... 499
2. **Bastardy — Uncontradicted Evidence — Province of Jury.** A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they find to be unreliable, although it may be uncontradicted. *Id.* ..... 499

INDEMNITY BONDS—See BONDS, 13.

INFANTS—See MINORS.



INFORMATION—See CRIMINAL LAW 21, 30-32, 34-36.

INJUNCTION:

1. **Criminal Prosecutions—Control of County Attorney—May Dismiss Action.** Where a justice of the peace sitting as an examining magistrate refuses to dismiss a criminal prosecution on the motion of the county attorney, the district court by an order in the nature of a writ of prohibition may compel such dismissal. *Foley v. Ham*..... 66
2. **Criminal Prosecution—Refusal of Justice to Dismiss Action—Writ of Prohibition.** Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition. *Id.*..... 66
3. **Criminal Prosecutions—Unwarranted Prosecutions—Injunction.** Injunctions against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened. *Id.*, 66
4. **Nuisance—Horse and Mule Market—Private Nuisance—Public Nuisance.** A business may be conducted under conditions which will constitute it a private as well as a public nuisance. *Winbigler v. Clift*..... 858
5. **Nuisance—Petition to Abate Private Nuisance—Sufficient.** On the facts stated in the opinion it was error to sustain a demurrer to the petition in a suit brought by an individual to enjoin the keeping of a horse and mule market in close proximity to his residence. *Id.*..... 858
6. **Nuisance—Public Nuisance Shown by the Evidence.** The evidence was sufficient to justify a finding that a horse and mule market conducted by the defendant constituted a public nuisance. *Id.*..... 858
7. **Paving—Special Assessments—Injunction—Statute of Limitations.** The statutory limitation that an action cannot be maintained to enjoin a special assessment for street improvements unless begun within thirty days after the amount due on property assessed is ascertained, applies to invalidity as well as irregularity in making the assessments. *Park Association v. City of Hutchinson*..... 488
8. **Restraining Enforcement of Mandate of Supreme Court.** A defeated appellant applied to the district court in vain for an injunction to restrain the enforcement of the mandate of the supreme court. Upon appeal his application is found to be without semblance of merit and it is dismissed. *Forbes v. Madden* ..... 46
9. ——— If there had been any merit in the application the district court was without power to enjoin or restrain judgments and orders of the supreme court. *Id.*..... 46
10. **Surface Water—Drainage—Depression—Not a Watercourse.** A depression on plaintiff's land into which surface water from defendant's land flowed in time of heavy rains was not necessarily a natural watercourse into which defendant might lawfully drain the surface waters from his land. *Evans v. Diehl* ..... 728
11. ——— A depression into which surface and standing waters may be drained is not necessarily a natural watercourse merely because flood waters from a neighboring river find their way into that depression when the river is in flood. *Id.*, 728

## INJUNCTION—CONTINUED:

12. **Surface Water — Drainage — Injuring Neighbor's Land — Injunction.** Findings of fact on which a judgment enjoining the maintenance of a drain and ditch was based examined, and no substantial conflict discerned therein. *Id.*..... 728

## INNOCENT HOLDER—See NEGOTIABLE INSTRUMENTS, 11.

## INSANE PERSONS:

1. **Insane Persons—Guardian May be Appointed without Notice.** A probate court may without notice appoint a successor to a guardian for a lunatic, who has been duly adjudged to be a person of unsound mind, confined in a state hospital, and discharged therefrom as improved. *Ekblad v. Linderholm*... 3
2. **Mandamus—Insane Person—Conducting His Own Litigation.** A person who has been adjudged insane and who is under guardianship cannot conduct litigation without the supervision, control and protection of his guardian. *Linderholm v. Walker* ..... 684
3. ——— When it clearly appears that a person who has been adjudged insane is the plaintiff in an action and that he is seeking to maintain that action independent of his guardian and without the approval of the latter, the action should be dismissed. *Id.*..... 684

## INSURANCE:

1. **Accident Insurance—School Teacher—Injured while Cutting Tree.** One insured against accident as a school teacher was accidentally killed while cutting a tree for his father at his father's place, held that the cutting of the tree is not to be regarded as a change to a more "hazardous occupation" under the terms of the policy. *Evans v. Accident Association*... 556
2. ——— If the terms of an accident policy are obscure or open to more than one construction the one which is more favorable to the insured must prevail. *Id.*..... 556
3. **Benefit Insurance — Agreement Not to Change Beneficiary — Vested Right.** A vested interest in a certificate issued by a mutual benefit association may be created after its issuance as well as at that time, by an agreement on the part of the member not to change the beneficiary in consideration of the payment of assessments. *Sipe v. Sipe*..... 742
4. **Benefit Insurance—Agreement of Wife to Make Payments—Substantial Performance.** Where a wife agreed with her husband to keep up payments on his benefit certificate, which named the wife as beneficiary, in consideration of the husband's promise not to change the beneficiary, the evidence showed a substantial compliance on the part of the wife. *Id.*..... 742
5. **Benefit Insurance—Application—Omissions by Agent—Policy Valid.** Where an applicant for benefit insurance gives to the agent correct answers to the questions contained in his application, but the agent leaves out such answers, and the applicant signs such application without reading, action on the policy will not be defeated by reason of the omission of such answers. *Shinn v. Benefit Association*..... 134
6. **Benefit Insurance—Claims—To Whom First to be Presented.** It is competent for a mutual benefit association to require that claims against it upon its certificates shall be submitted in the first instance to a tribunal designated by it. *Conroy v. Railroad Trainmen*..... 757

## INSURANCE—CONTINUED:

7. **Benefit Insurance—Jury in Advisory Capacity Only—Effect of Improper Evidence.** Where a jury is called in an advisory capacity only, a judgment will not be reversed for admission of incompetent evidence unless it appears that the improper evidence affected the result. *Sipe v. Sipe*..... 742
8. **Benefit Insurance—Nonpayment of Dues—Clerical Error in Notice—No Waiver.** A clerical error in a letter from an officer of a benefit association erroneously fixing the date when a delinquent member was suspended, will not waive the forfeiture for nonpayment of dues. *Conroy v. Railroad Trainmen*, 757
9. **Benefit Insurance—Nonpayment of Dues—Forfeiture—Custom.** Where a delinquent member of a benefit association seeks to avoid a forfeiture by reliance upon a custom of accepting delinquent payments within a definite period after default he must show an offer to make payments within the limit of time as so extended. *Id.*..... 757
10. **Contract with Agent—Recovery.** One contracting with the state agent of an insurance company to render service for the agent, and rendering such service under the contract, must look to the agent for his compensation. *The State, ex rel., v. Insurance Co.*..... 266
11. **Fidelity Insurance—Construction of Bond—Recovery.** A surety bond indemnifying a bank against loss by a cashier's fraud or dishonesty amounting to embezzlement or larceny covered loss occasioned by his general fraud or dishonesty. *Bank v. Colton*..... 365
12. ——— In a suit on a fidelity bond technical proof of fraudulent acts as required in criminal prosecution for embezzlement or larceny is not necessary. *Id.*..... 365
13. **Fidelity Insurance—Notice of Loss—Waiver.** Failure of plaintiff bank to give immediate notice of loss by reason of the cashier's fraud or dishonesty held waived by insurer's denial of liability upon other distinct grounds. *Id.*..... 365
14. **Foreign Insurance Company—Process—Service on Agent.** Service upon a duly licensed general agent of a foreign insurance company whose principal office is in the county is sufficient to give the court jurisdiction of the company. *Snelling v. Benefit Association*..... 227
15. ——— To acquire jurisdiction in the way stated does not violate the fourteenth amendment to the federal constitution. *Id.*..... 227
16. **Foreign Insurance Company—Where Suit May be Brought—Statute.** Under section 53 of the civil code an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found regardless of where the cause of action arose or of the residence of the plaintiff. *Id.*..... 227
17. ——— The provisions in the last part of section 53 that an action against a foreign insurance company may be brought in any county where the cause of action or some part thereof arose is a permissive and cumulative remedy and not an exclusive remedy. *Id.*..... 227
18. **Fraternal Insurance—Financier of Local Lodge—Agent of Insurer—Void By-law.** In receiving payment of dues after suspension of a member the financier of the local lodge is an agent of the beneficiary society and not of the member and a by-law making such financier the agent of the member is void. *Allen v. Knights and Ladies*..... 128

INSURANCE—CONTINUED:

19. **Fraternal Insurance—Payment of Dues after Suspension—Warranty of Good Health.** In an action on a fraternal benefit certificate an instruction respecting the provision of the by-laws that payment of back dues and assessments constituted a warranty that the member's health was good, was not prejudicial. *Id.* ..... 128
20. **Fraternal Insurance—Suspension—Effect of Acceptance of Back Dues—Estoppel.** After accepting from the beneficiary the dues and assessments for the two months preceding the death of the assured and retaining them it was too late for the defendant to question the authority of the beneficiary to make the payments. *Id.* ..... 128
21. **Fraternal Insurance—Suspension—Reinstatement—Acceptance of Dues—Custom.** In an action on a benefit certificate where the member had been suspended for nonpayment of dues it was not error to admit evidence of a custom of the local lodge officers to accept dues and assessments from delinquent members and thus to reinstate them. *Id.* ..... 128
22. **Fraternal Insurance—Verdict—Judgment—Interest.** In an action on a benefit certificate where the jury returned a verdict for the face of the certificate "with interest at six percent" and the court rendered judgment thereon for the amount with six percent interest from the date of assured's death, no error was committed. *Id.* ..... 128
23. **Hail Insurance—Incompetent Evidence of Amount of Loss.** In an action for loss under a hail insurance contract the admission of evidence of amounts paid by the insurance company to other persons in settlement of losses to wheat crops occasioned by the same hailstorm was error. *Williams v. Insurance Co.* ..... 74
24. **Hail Insurance—Oral Contract by Agent—Premium Accepted—Contract Valid.** Where an insurance agent made an oral contract for hail insurance and forwarded the premium to the company, which retained control and exercised ownership over it, the company is estopped to deny the contract, though its agent had no authority to make an oral contract for insurance. *Id.* ..... 74
25. **Insurance Agent—Failure to Cancel Policy—Agent Liable for Loss.** Where an insurance agent is instructed to cancel a policy of insurance issued by him, and he fails to do so, he is liable to his principal for the damage sustained by the principal, unless the agent can show some valid reason for his failure to follow his instructions. *Insurance Co. v. Bigger*... 58
26. **Insurance Companies—State Tax on Premiums—How Computed.** Under the statute the annual state tax of two per cent upon all premiums received by foreign insurance companies should be computed only upon the total premiums collected, retained and devoted to the business of the insurance companies. *The State, ex rel., v. Wilson*..... 752
27. **Insurance—Loss—Inconsistent Findings—New Trial.** The court granted a new trial of the cause because the verdict returned by the jury was not supported by the evidence, and because the special findings were inconsistent with each other and with the general verdict. Held, not error. *Tersina v. Insurance Co.* ..... 87
28. **Insurance—Loss "Payable to Mortgagee"—Change of Title to Insured Property—Policy Void.** Where the insured without consent of the insurance company transferred the title to the

## INSURANCE—CONTINUED:

- insured property the insurance policy, under its terms, was rendered void. *Longfellow v. Insurance Co.*..... 473
29. Life Insurance — Applications — Representations Not Warranties. The policy provided that the statements made by the insured should, in the absence of fraud, be deemed representations and not warranties. Held, that good faith in making such statements was sufficient although they may have been incorrect in fact. *Sharrer v. Insurance Co.*..... 650
30. Life Insurance — Payment of Premium Note Assumed by Agent—Note in Default—Policy Valid. Where the security for payment of an insurance premium note was not satisfactory to the company, but the company's local agent assumed and agreed to pay the note, and the note was not paid when due, the policy did not lapse. *Taylor v. Insurance Co.*... 863
31. ——— A loose use of the word "collateral" and a peculiar method of bookkeeping held not to affect seriously or materially the real question involved. *Id.*..... 863
32. Life Insurance—Physical Appearance of Applicant—Evidence. Testimony of neighbors as to the physical appearance of insured was properly received touching his good faith in making the statements contained in the application. *Sharrer v. Insurance Co.* ..... 650
33. Life Insurance—Verdict and Judgment Modified. The verdict and judgment being for more than the policy called for, the judgment is modified to conform to the terms of the policy, and thus modified the judgment is affirmed. *Taylor v. Insurance Co.* ..... 863
34. Life Insurance — Verdict — Instructions. The evidence supported the verdict and there was no error in the giving or refusing of instructions. *Sharrer v. Insurance Co.*..... 650

## INTEREST:

1. Condemnation Proceedings—Interest on Damages Sustained. A proceeding to condemn private property for public use does not involve a tort, and an owner whose land is so appropriated is entitled to interest on the damages sustained by him from the time of the appropriation. *Calkins v. Railroad Co.*..... 835
2. Fraternal Insurance—Verdict—Judgment—Interest. In an action on a benefit certificate where the jury returned a verdict for the face of the certificate "with interest at six per cent" and the court rendered judgment thereon for the amount with six per cent interest from the date of assured's death no error was committed. *Allen v. Knights and Ladies.*..... 128
3. Sale of Land — Interest on Payments — Abstract of Title. Under the evidence and terms of the contract the vendor of land was entitled to interest on deferred payments from the date of the contract and when the abstract of title was approved. *Gillidett v. Hayden.*..... 616
4. Settlement—Stipulation—Time of Payment—Interest. Where under a written stipulation the amount for which judgment should be rendered was stated, and the time of payment was postponed to a future period, such payment should draw interest from the time such payments were to be made. *Berry v. Dewey* ..... 392
5. Street Lighting Contract — Defaulted Payments — Interest Thereon. Where a city defaulted under its contract with a street lighting company in making payments, the defaulted

INTEREST—CONTINUED:

payments should only draw interest at the legal rate from the dates when they were severally due. *Street Lighting Co. v. City of Wichita*..... 4

INTERSTATE COMMERCE:

1. Interstate Bill of Lading—Acceptance by Consignee—Implied Contract to Pay Freight. Where an interstate bill of lading authorizes the consignee to pay the freight charges, an implied contract by the consignee to pay the full established freight charges arises from his acceptance of the delivery of the goods under the bill. *Railway Co. v. Wagner*..... 817
2. ——— In such case where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges. *Id.*..... 817
3. Interstate Commerce—Classification of Commodities—Binding on Court. In an action to recover the amount of undercharges for freight shipments, computed according to schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles. *Railway Co. v. Young*..... 875
4. Interstate Commerce—Established Rates—Binding on Shipper and Carrier. A schedule of freight rates duly filed and published by a railroad company and not disapproved by the interstate commerce commission, has the force of a statute, binding alike on shipper and carrier. *Id.*..... 875
5. Interstate Commerce—Injuries to Workman—Compensation Act Does Not Apply. The workmen's compensation act does not extend to the case of a workman engaged in interstate commerce who without his employer's fault is injured in the course of his employment. *Matney v. Railway Co.*.... 293
6. Schedule of Rates—Presumption that Schedule was Duly Published. Where it is admitted that a schedule of rates has been duly filed with and approved by the interstate commerce commission the presumption, in the absence of showing to the contrary, is that the rates were duly published. *Railway Co. v. Wagner*..... 817

INTERURBAN RAILWAYS—See STREET RAILWAYS, 7.

INTOXICATING LIQUORS:

1. "Bone-dry Law"—Information—Negative Allegations. Under the "bone-dry law" (Laws 1917, ch. 215) it is not necessary that an information should allege that the defendant was not a druggist or registered pharmacist. *The State v. Purello* ..... 695
2. ——— A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense. *Id.*..... 695
3. Information—Plea of Not Guilty—Preliminary Examination—Waiver. Where a defendant pleads not guilty to an information without raising a question as to the sufficiency of a preliminary examination, an objection upon that ground after conviction comes too late. *The State v. Perry*..... 896
4. Replevin of Taxicab—Maintaining Liquor Nuisance—Officers Entitled to Possession. Where a driver of a taxicab was arrested on the charge of maintaining a liquor nuisance therein

## INTOXICATING LIQUORS—CONTINUED:

on the public streets, and possession of the taxicab was taken by the police, the taxicab was rightfully in possession of the police and not subject to replevin by the owner. *Allison v. Hern* ..... 48

## J.

## JOINDER OF ACTIONS:

1. Compensation Act—Joinder of Actions—Compensation on Setting Aside Review. Under the compensation act an action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with the action for compensation. *Vogle v. Bowersock*..... 456

## JOINT DEFENDANTS:

1. Employment—Joint Defendants—No Separate Issues Raised—Joint Judgment. If one defendant sued jointly with others has a different defense from the others he should in the form of request for special findings or for special instructions or otherwise challenge the attention of the trial court to his separate defense. *Drysdale v. Wetz* ..... 422
2. ——— There being some evidence to sustain a judgment against all the defendants it is affirmed. *Id.*..... 422

## JOINT TORT-FEASORS—See TORTS, 4.

## JOURNAL ENTRY—See JUDGMENTS, 12-14.

## JUDGES:

1. Disqualification of Judge—Calling in Judge of another District. Where a district judge is disqualified to sit in a case and he calls in the judge of another district who after trying some of the issues declines to act further, it becomes the duty of the regular judge to request the judge of some other district to attend and serve as judge. *Berry v. Dewey*..... 392

## JUDGMENTS:

1. Compensation Act—Assignment of Judgment. The question whether an injured workman may assign a judgment under the workmen's compensation act to a trustee for the benefit of his children considered but not determined. *Monson v. Battelle* ..... 208
2. Compensation Act—Judgment—Death of Employee—Revivor. A lump-sum judgment in favor of a workman under the workmen's compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of the administrator. *Id.*..... 208
3. Compensation Act—Judgment—Motion for New Trial—Properly Denied. In an action under the compensation act the petition of defendant for a new trial on the ground of fraud and newly discovered evidence did not state facts sufficient to compel the granting of a new trial. *Lombard v. Planing Mill Co.* ..... 780
4. Compensation—Judgment Properly Modified. In a workmen's compensation case the court ordered that if the defendants defaulted in the payment of \$4 a week, the entire amount of compensation allowed should become due, and that execution should then issue therefor. Held, no error. *Id.*..... 780
5. Divorce—Decree—Property Rights Determined—Res Judicata. A final judgment in an action granting a divorce settles all property rights of the parties and is a bar to an

**JUDGMENTS—CONTINUED:**

- action afterward brought by either party to determine the question of alimony, or any property rights which might have been settled by the judgment. *Heivly v. Miller*..... 313
6. **Foreclosure—Error in Judgment—Error Corrected on Appeal.** Where a judgment of foreclosure was erroneous but not void and the sale was confirmed the defendants were bound by the judgment, and they could take advantage of the error only by appeal. *Marsh v. Votaw* ..... 747
7. **Foreclosure — Sale — Confirmation — Motion to Set Aside—Laches.** Where the original judgment of foreclosure was erroneous but not void, and three years after the sale and confirmation defendants filed a motion to set aside the confirmation, and that they be allowed to redeem, the application was made too late to entitle them to relief. *Id.*..... 747
8. **Foreclosure Sale—Confirmation Set Aside—Redemption Allowed.** In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, held, on the facts stated in the opinion, it was error to deny the relief prayed for. *Norris v. Evans*..... 583
9. **Injuries to Minor Son—Compromise by Father—Judgment by Consent—Parent's Authority.** Where a minor had sustained personal injuries which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries notwithstanding the settlement negotiated by his father. *Leslie v. Manufacturing Co.*..... 159
10. ——— An inadequate settlement by a father for injuries to his minor son does not bar an action by the son for such injuries on attaining his majority, although the father consented to a formal judgment therefor in a city court. *Id.*... 159
11. **Judgment against Testator — Lien on Testator's Interest in Land.** In an action by a judgment creditor against the estate of the judgment debtor only the actual interest of the judgment debtor in property can be appropriated. *Postlethwaite v. Edson*..... 104
12. **Judgment—Joint Debtors—Satisfaction by One—Subrogation.** A surety who satisfies a judgment against his principal, and files with the clerk a notice of his intention to claim repayment under section 474 of the civil code, has all the rights and remedies of an owner of the judgment for the purpose of enforcing repayment. *Kinkel v. Chase*..... 275
13. **Judgment on Creditor's Bill—Only Parties Affected Thereby.** A judgment against the defendant in a suit in the nature of a creditor's bill will not inure to the benefit of another creditor of defendant who is neither party nor privy to the judgment. *Id.* ..... 275
14. **Judgment Rendered—No Journal Entry Recorded—Judgment Valid.** The omission of the clerk to perform the ministerial duty of recording a judgment does not destroy the judgment nor does its validity or effect remain in abeyance until it is formally entered on the journal. *Id.*..... 275
15. **Mortgage Foreclosure—Personal Service—Default Judgment—Jurisdiction.** In a foreclosure action the district court has jurisdiction to render judgment by default, on personal service, without the notes and mortgage sued on being filed with the clerk or presented to the court. *Broquet v. Mosier*.... 246
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## JUDGMENTS—CONTINUED:

16. ——— It is not a fraud on the defendants in a foreclosure action for the plaintiff to fail to file with the clerk or to present to the court the notes and mortgage sued on, or to introduce any evidence in support of the petition, where personal service has been made and judgment is rendered by default. *Id.* ..... 246
17. Motion for Judgment—Pleadings—Notice. There is no statutory provision for making up issues for the trial of motions, and the filing of an answer to a motion for judgment does not require three days' notice of the time of the hearing of such motion. *Berry v. Dewey*..... 392
18. Negligence—Child Drowned—Judgment Not Excessive. A judgment for \$3,500 against a city for the wrongful death of a three-year-old child is not excessive to such an extent as to warrant its reduction by an appellate court. *Schaubel v. City of Manhattan*..... 430
19. Note and Mortgage—Foreclosure—Defense of Payment. In an action to foreclose a mortgage where the defense was payment the evidence abstracted was sufficient to sustain the judgment for defendant. *Kurt v. Shupe*..... 426
20. Report of Referee—"Decision of Court"—Judgment. The report of a referee determining the whole issue by findings of fact and conclusions of law separately stated, stands as the decision of the court, and judgment may be entered thereon. *Milling Co. v. Schreiber*..... 172
21. ——— The word "decision" in section 306 of the civil code providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue. *Id.*..... 172
22. School Warrants—Amount of Judgment. In an action on a school warrant which has been issued for a sum in excess of the amount due the creditor, but which is otherwise legally issued, the court may properly give judgment for the amount actually due on the indebtedness evidenced by the warrant. *Bank v. School District*..... 98
23. Settlement—Stipulation—Time of Payment—Interest. Where under a written stipulation the amount for which judgment should be rendered was stated, and the time of payment was postponed to a future period, such payment should draw interest from the time such payments were to be made. *Berry v. Dewey*..... 392

## JURISDICTION:

1. Action to Compel Reconveyance—Fraud—Action Transitory. An action to compel the defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud, is transitory and not local, and may be brought in any county where personal service can be had upon him. *Zane v. Vawter*..... 887
2. ——— The statute requiring actions "for the determination in any form" of an interest in real property to be brought in the county where it is situated relates to actions operating directly on the property, and does not apply where it is sought to control the personal conduct of defendant. *Id.*..... 887
3. Amount Involved Less than \$100—Appeal Dismissed. The district court having jurisdiction of the cause and the amount

**JURISDICTION—CONTINUED:**

- being for less than \$100, the appeal is dismissed. *Ridgway v. Wetterhold* ..... 217
4. **Appeal—Amount Involved Less than \$100—Appeal Dismissed.** Where in an action for the recovery of money only the amount in controversy is less than \$100 this court has no jurisdiction on appeal, and the appeal is dismissed. *Wagman v. Soller*.... 661
5. **Criminal Prosecutions—Control of County Attorney—May Dismiss Action.** While the county attorney is not required to take part in a preliminary examination in a felony case, unless requested to do so by the magistrate, if he does appear he is entitled to have full charge of the prosecution. *Foley v. Ham*, 66
6. ——— Where a justice of the peace sitting as an examining magistrate refuses to dismiss a criminal prosecution on the motion of the county attorney, the district court by an order in the nature of a writ of prohibition may compel such action. *Id.*, 66
7. **Criminal Prosecutions—Refusal of Justice to Dismiss Action—Writ of Prohibition.** Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition. *Id.*..... 66
8. **Criminal Prosecutions — Unwarranted Prosecutions — Injunction.** Injunction against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened. *Id.*, 66
9. **Death in Foreign State—Action for Damages by Kansas Administrator.** An administrator appointed by a Kansas probate court has no power to maintain an action in a Kansas court to enforce a liability created by the laws of another state for the wrongful death of the intestate which occurred in such other state. *Battese v. Railroad Co.*..... 468
10. **Disqualification of Trial Judge — Another Judge Called in.** *Berry v. Dewy*, ante, p. 392, is followed on the question of the jurisdiction of the trial judge. *Berry v. Dewey*..... 593
11. **Foreign Insurance Company — Process — Service on Agent.** Service upon a duly licensed general agent of a foreign insurance company whose principal office is in the county is sufficient to give the court jurisdiction of the company. *Snelling v. Benefit Association*..... 227
12. ——— To acquire jurisdiction in the way stated does not violate the fourteenth amendment to the federal constitution. *Id.*..... 227
13. **Foreign Insurance Company—Where Suit May be Brought—Statute.** Under section 53 of the civil code an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found, regardless of where the cause of action arose or of the residence of the plaintiff. *Id.*..... 227
14. ——— The provisions in the last part of section 53 that an action against a foreign insurance company may be brought in any county where the cause of action or some part thereof arose is a permissive and cumulative remedy. *Id.*..... 227
15. **Fugitive from Justice — Illegal Extradition — Jurisdiction of Kansas Courts.** Where the governor of a foreign state without legal authority causes the arrest of a Kansas fugitive from justice, and such fugitive is extradited and brought

## JURISDICTION—CONTINUED:

- into Kansas, he may be tried in a Kansas court notwithstanding the want of any legal authority for his extradition. *The State v. Wellman*..... 503
16. **Implied Contract—Use of Patented Invention—Jurisdiction of State Courts.** An action by the owner of a patent to recover upon an implied contract for use of a patented invention, with patentee's knowledge and consent, is not an action for the infringement of a patent, and the state courts have jurisdiction, notwithstanding the answer pleads the invalidity of the patent. *Ridgway v. Wetterhold*..... 217
17. **Injunction—Restraining Enforcement of Mandate of Supreme Court.** A defeated appellant applied to the district court in vain for an injunction to restrain the enforcement of the mandate of the supreme court. Upon appeal his application is found to be without semblance of merit, and it is dismissed. *Forbes v. Madden*..... 46
18. — If there had been any merit in the application the district court was without power to enjoin or restrain judgments and orders of the supreme court. *Id.*..... 46
19. **Injuries to Minor—Judgment by Consent of Parent—Jurisdiction of District Court.** Where a father compromised injuries to his minor son for a grossly inadequate sum and consented to a formal judgment therefor in a city court, the minor son on attaining his majority may maintain an action for such injury in the district court. *Leslie v. Manufacturing Co.* ..... 159
20. **Judgment—Illegal City Court—Appeal—Jurisdiction of District Court.** Where a statute creating a city court was unconstitutional, and on appeal to the district court the case was tried on its merits, without objection by either party, it is too late after judgment to question the jurisdiction of the district court on the ground of the illegality of such city court. *Neal v. Kent*..... 239
21. **Mortgage Foreclosure—Personal Service—Default Judgment—Jurisdiction.** In a foreclosure action the district court has jurisdiction to render judgment by default, on personal service, without the notes and mortgage sued on being filed with the clerk or presented to the court. *Broquet v. Mosier*..... 246
22. — It is not a fraud on the defendants in a foreclosure action for the plaintiff to fail to file with the clerk or to present to the court the notes and mortgage sued on, or to introduce any evidence in support of the petition, where personal service has been made and judgment is rendered by default. *Id.* ..... 246
23. **Natural Gas Companies—Jurisdiction to Change Rates—Receivers.** The state courts have no jurisdiction through receivers to regulate rates of public service corporations, and neither the courts nor receivers of such corporations may change legal rates without consent of the public utilities commission. *The State v. Gas Co.*..... 712
24. — When the legal rates charged by the receiver of a public service corporation have been legally enjoined the receiver may put into effect rates to be charged until the commission establishes a new rate. *Id.*..... 712
25. **Nonsupport of Child—Accused Absent from State—Jurisdiction of Kansas Courts.** Where a father accused of nonsupport of a child is surrendered by another state to Kansas as a fugitive from justice, the fact that the accused had not been

## JURISDICTION—CONTINUED:

- in this state at the time of the alleged offense, nor since then, does not deprive the Kansas court of jurisdiction to try him for the offense. *State v. Wellman*..... 503
26. ——— A person who has never been in this state may under some circumstances be convicted here of a violation of the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his children under the age of sixteen years who are in destitute circumstances. *Id.* ..... 503
27. Nonsupport of Child—Nonresident Parent—Resident Child—Statute. Where a nonresident parent neglects to support his minor child living in this state and leaves it in necessitous circumstances he is guilty of violation of the Kansas desertion act although he is not in Kansas at the time of the alleged offense. *Id.* ..... 503
28. ——— Where such nonresident of Kansas comes or is brought into this state, either voluntarily or involuntarily, he may be arrested and punished under the Kansas statute for nonsupport of his destitute child. *Id.*..... 503
29. Transcript from Justice of Peace—Filed with District Clerk of Another County—Void Execution. Where a transcript of a judgment of a justice of the peace is filed with the district clerk and a copy of such transcript is filed with the district clerk of another county, the district court of the latter county has no jurisdiction to issue an execution thereon or to confirm a sheriff's sale made thereunder. *Id.*..... 725
30. Transcript from Justice's Docket—Jurisdiction of District Court. Where the justice's transcript showed that after preliminary examination the defendant was required to, and did, give recognizance for his appearance in district court, the transcript was sufficient to confer jurisdiction on the district court. *Foley v. Ham* ..... 66

## L.

LACHES—See MORTGAGES, 12-14.

## LANDLORD AND TENANT:

1. Contract—Lease—Improvements—Limitation of Actions—Statute of Frauds. Where the time fixed for the payment of an oral obligation might have arrived within one year, and the promisee had fully performed his part, the statute of limitations did not begin to run until the obligation matured, and the obligation was not repugnant to the statute of frauds. *Henshaw v. Smith* ..... 599
2. Lease—Breach of Covenant to Repair—Damages which Could Be Averted. Where a landlord breaches his contract to make repairs and the tenant receives personal injuries, she will not be permitted to recover damages which could have been averted by making the repairs at slight expense on her part. *Murrell v. Crawford* ..... 118
3. Lease—Breach of Covenant to Repair—Personal Injuries—Contributory Negligence. Where a tenant knows that a porch is in need of repair, but continues to use it, and is injured thereby, she is guilty of contributory negligence notwithstanding the landlord had promised to repair the porch but failed to do so. *Id.*..... 118
4. Lease—Breach of Covenant to Repair—Personal Injuries—Measure of Damages. On a breach of covenant by the land-

## LANDLORD AND TENANT—CONTINUED:

- lord to make repairs, the measure of damages is the difference between the rental value of the premises as they were and what it would have been if they had been put and kept in repair. *Id.*..... 118
5. ——— The ordinary rule is that an award of damages for a landlord's breach of covenant to repair a dwelling house is not extended to include a liability for personal injuries sustained by the tenant in the use of the unrepaid property. *Id.*..... 118
6. Lease — Grain Rent — Pasturing Growing Crop — Rights of Landlord. Under a lease providing for a grain rent to be delivered at a railway station, the landlord had no claim against his tenant for a share of the proceeds of pasturing the growing crop. *Mull v. Boyle*..... 579
7. ——— In an action by the landlord against tenants for damages done to the land by the pasturage, it is not error to instruct that they had a right to pasture the growing crop, being responsible to the owner for any resulting injury to the land. *Id.*..... 579
8. Lease — Improvements by Tenant — Reimbursement — When Due. Where a tenant makes improvements on the farm for which the landlord agrees to pay when the tenancy is terminated, reimbursement for such improvements is due when the landlord voluntarily terminates the tenancy. *Henshaw v. Smith*..... 599
9. Lease — Landlord to Furnish Stock — Default of Landlord — Remedies. Where by the terms of a lease the landlord agreed to furnish cattle and hogs and in addition to a crop rental the increase of the stock was to be divided and the landlord failed to furnish any stock the tenant must pay the crop rent, but is entitled to recoup his damages sustained by the landlord's default. *Seapy v. Smart*..... 294
10. Lease — Measure of Damages — Rule of Construction. Where parties by agreement fix the measure of recovery due from the one to the other, their agreement governs, and abstract principles of law relating to the measure of recovery when agreements are wanting are inapplicable. *Henshaw v. Smith*, 599
11. Lease of Hotel — Annual Rent — Nonpayment — Termination of Tenancy — Notice. To terminate a lease of property for a period of one year on account of the nonpayment of rent, a ten days' notice in writing must be given to the tenant, and such a notice will not terminate the tenancy if the rent is paid before the expiration of the ten days. *Norris v. McKee*..... 63
12. Lease of Hotel — Covenant Not to Underlet — Leasing One Room — Oral Consent. Where a hotel lease contains a covenant that the premises shall not be underlet without written consent of the landlord, and the lessee with oral consent of the landlord lets one room in which a small printing plant was installed, the landlord thereby waived any right to terminate the lease for such a subletting. *Id.*..... 63
13. Lease — Repairs — No Implied Obligations. Where a written lease provides that repairs are to be made by the tenant, the landlord's subsequent promise to make them is not enforceable, unless supported by a new consideration. *Garner v. Grocery Co.*..... 5
14. ——— The landlord is not under any implied obligation to make repairs. *Id.*..... 5

LANDLORD AND TENANT—CONTINUED:

15. Oil and Gas Company Lease—Forfeiture—Garnishment of Assets—Rights of Creditors. Where an oil and gas company began drilling a well on leased premises and then abandoned the lease, leaving their drilling outfit on the leased premises, such drilling outfit became subject to garnishment in the hands of the lessee by the company's creditors. *Hardware Co. v. Oil & Gas Co.*..... 144
16. Oil and Gas Lease—Failure to Develop—Lessor's Remedy—Damages—Forfeiture. Where an oil lease embraced two separate tracts of land and the lessee failed to develop one of the tracts for fourteen years the lessor may recover damages for delay and the lessee be required to develop the tract within reasonable time under penalty of forfeiture of the lease. *Alford v. Dennis*..... 403
17. Oil and Gas Lease—No Conveyance of Real Estate. The provision of an oil and gas lease examined and held the instrument did not operate to sever and convey as real estate subsurface mineral deposits. *Hover v. McNeill*..... 492

LEASE—See LANDLORD AND TENANT, 17; MINES AND MINERALS, 6-13.

LIENS AND LIENHOLDERS:

1. Attorney's Lien — Application for Allowance — Affidavits — Cross-examination of Affiants. An application for the distribution of a fund against which several attorneys' liens are claimed is a motion, and the code permits the use of affidavits at the hearing thereof. *Ricardo v. Coal & Coke Co.*..... 170
2. ——— An attorney whose claim of lien is denied because the court is convinced that he has performed no services entitling him thereto has no standing to complain of the refusal to allow him to cross-examine the makers of affidavits used in behalf of other claimants. *Id.*..... 170
3. Construction of Will—Life Estate—Remainders—Judgment Liens—Homestead. Under a joint will executed by husband and wife, the wife, as survivor, took a life estate with power of disposition, and upon her failure to make disposition during life the children took the remainder subject to a judgment lien against the husband. *Postlethwaite v. Edson*..... 104
4. ——— The homestead character of real estate depends upon family occupancy—not on the source of title. *Id.*..... 104
5. Indebtedness of Heir to Ancestor—Equitable Distribution of Estate—Limitation of Actions. An indebtedness owing by an heir to his ancestor constitutes an equitable lien in favor of the estate upon such heir's distributive share of the real property belonging to the estate superior to the lien of any judgment against such heir existing at the time of the death of the ancestor. *Wilson v. Channell*..... 793
6. ——— In determining the equities between an heir who is indebted to an ancestor and the ancestor's estate, the statute of limitations has no application. *Id.*..... 793
7. Judgment against Testator—Lien on Testator's Interest in Land. In an action by a judgment creditor against the estate of the judgment debtor only the actual interest of the judgment debtor in property can be appropriated. *Postlethwaite v. Edson* ..... 104
8. Mortgage—Deed from Mortgagor to Mortgagee—Mortgagor Released—Mortgage Lien Kept Alive. For the purpose of accomplishing an equitable result, a mortgage lien may be

**LIENS AND LIENHOLDERS—CONTINUED:**

- kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor, or of any one else, for satisfaction of the debt. *James v. Williams*..... 231
9. ——— Where the holder of a lien on real estate acquires the legal title to the property, with the intention that such lien shall not merge in the legal title, such intention will prevail as against junior incumbrances. *Id.*..... 231

**LIFE INSURANCE—See INSURANCE, 29-34.**

**LIMITATION OF ACTIONS:**

1. **Action on Tort—New Action on Contract—Statute of Limitations.** An action for damages resulting from negligence is not the same as one on a contract of settlement, and the pendency of an action founded on such a contract does not suspend the running of the statute of limitations against an action on the tort. *Thompson v. Railway Co.*..... 668
2. **Claim against Estate—Statute of Limitations.** Where two persons jointly perform services for another, which services were to be paid for by the recipient thereof, "after she was through with her property," a demand against the latter's estate after her death, if timely made, is not affected by the statute of limitations. *Dubbs v. Haworth* ..... 603
3. **Compensation Act—Injury to Minor—Presentation of Claim—Statute of Limitations.** The action of a minor by his next friend to recover under the workmen's compensation act is not barred because the written claim for compensation was not served within three months from the date of the injury—no guardian having been appointed. *Minturn v. Manufacturing Co.* ..... 885
4. **Contract—Lease—Improvements—Limitation of Actions—Statute of Frauds.** Where the time fixed for the payment of an oral obligation might have arrived within one year, and the promisee had fully performed his part, the statute of limitations did not begin to run until the obligation matured and the obligation was not repugnant to the statute of frauds. *Henshaw v. Smith*..... 599
5. **Counterclaim—Exchange of Land.** In an action for shortage in land conveyed to plaintiff by defendant, wherein defendant counterclaimed for shortage in a stock of merchandise traded to him for the land, section 6994 of the General Statutes of 1915 prevented an application of the statute of limitations to the counterclaim. *McKenna v. Morgan*..... 478
6. **Defendant's Absence from State.** The finding that on account of the defendant's absence from the state the plaintiff's action was not barred held to be supported by the evidence. *Thompson v. Millikin*..... 717
7. **Demurrer to Evidence Sustained—Time for Appeal.** To review a ruling of the court sustaining a demurrer to plaintiff's evidence and giving judgment for the defendant it is necessary that the appeal be taken within six months after the ruling is made, and the filing of a motion for a new trial does not operate to extend the time for such appeal. *Sheahan v. Kansas City*..... 252
8. **Indebtedness of Heir to Ancestor—Equitable Distribution of Estate—Limitation of Actions.** In determining the equities between an heir who is indebted to an ancestor and the an-

## LIMITATION OF ACTIONS—CONTINUED:

- cestor's estate the statute of limitations has no application. *Id.* ..... 793
9. **Lease—Improvements by Tenant—Reimbursement—When Due.** Where a tenant makes improvements on the farm, for which the landlord agrees to pay when the tenancy is terminated, reimbursement for such improvements is due when the landlord voluntarily terminates the tenancy. *Henshaw v. Smith* ..... 599
10. **Malicious Prosecution—Statute of Limitations.** In an action for malicious prosecution the causes of action set forth in the first and second counts of the petition are held to be barred by the statute of limitations. *Smith v. Parman*..... 787
11. **Mining Coal—Subsidence of Surface—Damages—Limitation of Actions.** An action for damages caused by the subsidence of the surface of land, brought about by mining coal therefrom, is not barred by the statute of limitations until two years have elapsed after the surface has subsided. *Walsh v. Fuel Co.*..... 29
12. **Negligence—Action Dismissed—New Action—Limitation of Actions.** A plaintiff whose action is disposed of otherwise than on the merits cannot in a new action brought within a year engraft causes that are barred upon causes pleaded in the first action that are not barred. *Brice-Nash v. Street Railway Co.* ..... 36
13. ——— Herein it is held that the cause of action stated in the second action is substantially the same as that pleaded in the first. *Id.* ..... 36
14. **Paving—Special Assessments—Injunction—Statute of Limitations.** The statutory limitation that an action cannot be maintained to enjoin a special assessment for street improvements unless begun within thirty days after the amount due on property assessed is ascertained, applies to invalidity as well as irregularity in making the assessments. *Park Association v. City of Hutchinson*..... 488
15. **Public Building—Indemnity Bond—Statute of Limitations.** The terms of a bond given in connection with a contract for the erection of a public building considered, and held, the bond was one to supersede mechanics' liens, to which the general statute of limitations applies. *Iron Work Co. v. Surety Co.*... 699
16. **Sewer Contract—Breach—Damages—Surety—Limitation of Actions.** In an action by a city against a surety of a contractor to recover costs and expenses incurred and paid by reason of the contractor's misfeasance, costs which accrued and were paid by the city within five years before the action was begun were not barred as to the surety company. *City of Topeka v. Ritchie*..... 384
17. **Subsidence of Land—Damages—Limitation of Actions.** In an action for damages from subsidence of surface caused by mining coal the evidence sustained the finding that the surface had subsided in many different places within two years prior to commencement of the action. *Walsh v. Fuel Co.*..... 29
18. **Surety Company—Benefit of Statute of Limitations.** The defendant surety company was not, when this action was begun, a foreign corporation within the purview of section 20 of the civil code. *City of Topeka v. Ritchie*..... 384
19. **Town Site—Levees—Nonuse—Adverse Possession—Statute of Limitations.** Duties and privileges conferred and imposed



**LIMITATION OF ACTIONS—CONTINUED:**

upon a municipal corporation and exclusively for the public benefit cannot be lost through nonuse, estoppel or adverse possession, and statutes of limitation are not ordinarily applicable thereto. *Douglas County v. City of Lawrence*..... 656

**LOAN AND INVESTMENT COMPANIES—See TAXATION, 3-13.****M.****MALICIOUS ASSAULT—See ASSAULT, 5-8.****MALICIOUS PROSECUTION:**

1. **Action Prematurely Brought.** An action will not lie for malicious prosecution of a civil action which is still pending. *Tire Co. v. Kirk* ..... 418
2. **Malicious Prosecution—Conviction in Police Court—Probable Cause Shown.** The third count in the petition is held to state no cause of action, because the conviction in the police court is conclusive of probable cause. *Smith v. Parman*..... 787
3. **Malicious Prosecution—Statute of Limitations.** In an action for malicious prosecution the first count of the petition is held subject to demurrer because the action was barred by the one-year statute of limitations. *Id.*..... 787
4. ——— The second count of the petition is held barred because an amendment alleging that defendants gave false testimony at the trial which resulted in plaintiff's conviction brought in a new and different cause of action, and having been filed more than one year after the cause of action accrued it was too late. *Id.*..... 787

**MANDAMUS:**

1. **Chiropractic Examiners—Fees Go to State Treasurer in Official Capacity.** Section 10 of chapter 291 of the Laws of 1913 (Gen. Stat. 1915, §10223) required the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board. *Robb v. Knapp*..... 398
2. **Dismantling Telephone Line—Another Efficient Line Established.** The dismantling of a direct telephone line between two places does not constitute an objectionable change in service, where another equally efficient line, though not a direct one, between the two points is established. *The State, ex rel., v. Telephone Co.*..... 318
3. **Enactment of Statute—Appropriation of Money by "Concurrent Resolution."** Where a "house concurrent resolution" purporting to appropriate public money passed both houses, was approved by the governor, and in all respects received the same treatment as a regularly enacted bill, it will be regarded as a valid appropriation statute. *The State, ex rel., v. Knapp*... 701
4. **Gratuitous Service—Discriminatory Practice.** The gratuitous allowance by one telephone company of the use by another company of a line owned by it constitutes a discriminating practice forbidden by the statute, and therefore is not one which the utilities commission can require to be continued. *The State, ex rel., v. Telephone Co.*..... 318
5. **Insurance Companies—State Tax on Premiums—How Computed.** Under the statute the annual state tax of two per cent upon all premiums received by foreign insurance companies should be computed only upon the total premiums collected, retained and devoted to the business of the insurance companies. *The State, ex rel., v. Wilson*..... 752

**MANDAMUS—CONTINUED:**

6. **Mandamus—Approval of Appeal Bond—Writ Denied.** The supreme court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency, when the judge's good faith is not challenged. *Linderholm v. Walker* ..... 684
7. ——— Some other simple reasons showing why writ of mandamus should not issue, discussed. *Id.*..... 684
8. **Mandamus—Insane Person—Conducting His Own Litigation.** A person who has been adjudged insane and who is under guardianship cannot conduct litigation without the supervision, control and protection of his guardian. *Id.*..... 684
9. ——— When it clearly appears that a person who has been adjudged insane is the plaintiff in an action, and that he is seeking to maintain that action independent of his guardian and without the approval of the latter, the action should be dismissed. *Id.*..... 684
10. **Mandamus—To Compel Employment of Teacher—Writ Denied.** A writ of mandamus will not issue to compel the board of education of a city of the second class to employ an additional teacher in any particular school in the city. *Miles v. Board of Education*..... 137
11. **Ouster—Clerk of City Court—Former Prosecution—Matters Res Judicata.** A former prosecution for ouster is not a bar to a prosecution for unlawful acts which occurred after the petition in such former action was filed, and which were not included therein. *The State, ex rel., v. Fishback*..... 178
12. **Ouster—Clerk of City Court—Retaining County Money—Pleadings.** A petition for ouster of a clerk of a city court which alleges a willful failure to pay certain funds into the county treasury as required by section 3310 of the General Statutes of 1915 states a cause of action under section 7603 of the General Statutes of 1915. *Id.*..... 178
13. ——— A misunderstanding of unambiguous statutes is no defense to an action of ouster based upon a willful violation of such statute. *Id.*..... 178
14. **Statute Authorizing Certain School Bonds Repealed.** Section 9081 of the General Statutes of 1915, authorizing certain school bonds, has been repealed by chapter 268 of the Laws of 1917. *Board of Education v. Clapp*..... 362
15. **Utilities Commission—Order Enforceable by Mandamus.** This court has jurisdiction to enforce by mandamus an order of the utilities commission, notwithstanding the pendency in the district court of an action to enjoin its enforcement. *The State, ex rel., v. Telephone Co.*..... 318
16. **Utilities Commission—Telephone Line Discontinued—Restoration Ordered—Mandamus Denied.** Where a telephone line is discontinued without consent of the utilities commission and facts are shown to that tribunal which would have compelled the granting of such consent had it been asked, obedience of an order of the utilities commission directing restoration will not be compelled by mandamus. *Id.*..... 318

**MASTER AND SERVANT:**

1. **Car Repairer—Not Engaged in Interstate Commerce.** A car repairer was not engaged in interstate commerce while working on a car which was being repaired in railroad shops and not in use in any kind of transportation. *Defenbaugh v. Railroad Co.* ..... 569

## MASTER AND SERVANT—CONTINUED:

2. City—Constructing Sewer—Injuries to Workman Not Within Compensation Act. While constructing a sewer a city is not engaged in an enterprise involving any element of gain or profit, and does not come within the terms or operation of the workmen's compensation act. *Redfern v. City of Anthony*... 484
3. Compensation Act—Assignment of Judgment. The question whether an injured workman may assign a judgment under the workmen's compensation act to a trustee for the benefit of his children considered but not determined. *Monson v. Battelle* ..... 208
4. Compensation Act—Injuries by Sportive Acts of Coemployee—Liability of Employer. If an employee is assaulted by a fellow workman, whether in anger or in play, the employee is not entitled to compensation therefor unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees. *Stuart v. Kansas City* ..... 307
5. Compensation Act—Injuries—Judgment Not Excessive. Under the compensation act a judgment for \$1,690 for accidental injuries to a workman's eye does not appear excessive. *Id.*.... 307
6. Compensation Act—Injuries—Sportive Acts of Coemployee—Recovery. Where an employee was injured by having mortar playfully thrown into his eye by a coemployee, and the employer knew of the habit of the coemployee of playing jokes or pranks on other workmen, the employer was liable under the compensation act for the injuries so inflicted. *Id.*..... 307
7. ——— Under the workmen's compensation act a workman who is injured in the performance of his labor is entitled to compensation although he cannot explain how the accident occurred. *Id.*..... 307
8. Compensation Act—Judgment—Death of Employee—Revivor. A lump sum judgment in favor of a workman under the workmen's compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of the administrator. *Monson v. Battelle*..... 208
9. Compensation Act—Judgment—Petition for New Trial—Properly Denied. In an action under the compensation act, the petition of defendant for a new trial on the ground of fraud and newly discovered evidence did not state facts sufficient to compel the granting of a new trial. *Lombard v. Planing Mill Co.* ..... 780
10. Compensation Act—Pain from Injuries—Right to Compensation Therefor. Under the workmen's compensation act compensation can be recovered where inability to labor is caused by pain resulting from an injury received in an accident arising out of, and in the course of the employment. *Trowbridge v. Wilson & Co.* ..... 521
11. Compensation Act—Petition for New Trial—Proceeding on Appeal. The evidence held to support a finding that the plaintiff was injured where he was employed by having to wade through floodwater, an old wound on his foot being thereby infected, requiring amputation. *Monson v. Battelle*..... 208
12. ——— Such an injury is one "by accident," within the meaning of the phrase as used in the statute. *Id.*..... 208
13. ——— Such an injury is one arising out of and in the course of plaintiff's employment, within the meaning of the statute. *Id.* ..... 208

## MASTER AND SERVANT—CONTINUED:

14. **Compensation Act—Release Set Aside—Sufficiency of Evidence.** Under the compensation act an action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation. *Vogler v. Bowersock* ..... 456
15. **Compensation Act—Settlement—Written Release—Inadequate Compensation.** A voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter, in the absence of fraud or mistake, is valid and binding. *Dotson v. Manufacturing Co.* ..... 248
16. ——— A voluntary release and satisfaction of an injured workman's claim under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer. *Id.* ..... 248
17. **Compensation Act—Validity of Release—Trial by Jury.** In an action under the compensation act to enforce compensation, where the validity of a release or other discharge of liability is involved either party may, when the case is called for trial, demand a trial of that issue by a jury. *Vogler v. Bowersock*, 456
18. **Compensation—Judgment Properly Modified.** In a workman's compensation case the court ordered that if the defendants defaulted in the payment of \$4 a week the entire amount of compensation allowed should become due, and that execution should then issue therefor. Held, not error. *Lombard v. Planing Mill Co.* ..... 780
19. **Death of Fireman—Falling from Moving Train—Assumption of Risk.** Under the federal employer's liability act, where an experienced fireman seeing his train in motion climbed on top of a car, and while going forward over the car tops fell and was killed, he assumed the risk. *Briggs v. Railroad Co.* ... 441
20. **Detective Agent—Assaulting Suspected Criminal—Extorting Confession.** Where a detective agency authorized its representative to obtain a confession from a suspect, and in executing that authority an unlawful assault and battery is committed upon the suspect, the detective agency is liable for the damages resulting from the unlawful assault. *Mansfield v. Detective Agency* ..... 687
21. **Factory Act—Compromise by Widow—Rights of Infant Child.** A cause of action for the death of a workman, arising under the factory act, may not be compromised by the widow to the prejudice of an infant child entitled to share in the damages recoverable. *Jeffries v. Elevator Co.* ..... 811
22. **Factory Act—Death—Widow May Maintain Action.** When no personal representative has been appointed a widow may maintain an action under the factory act for the death of her husband. *Id.* ..... 811
23. **Interstate Commerce—Injuries to Workman—Compensation Act Does Not Apply.** The workmen's compensation act does not extend to the case of a workman engaged in interstate commerce who, without his employer's fault, is injured in the course of his employment. *Matney v. Railway Co.* ..... 293
24. **Negligence—Allegations—Proof.** Two of the three alleged grounds of negligence being based on matters not required of the defendant railroad, and the other having failed of proof, the plaintiff cannot prevail. *George v. Railway Co.* ..... 774
25. **Negligence—Car Equipment Required for Protection of Brakemen.** A train is required to have eighty-five percent of its

## MASTER AND SERVANT—CONTINUED:

- cars equipped with air brakes, so that it can be operated by the engineer, thus rendering it necessary to have certain of its cars connected by air hose. *Id.*..... 774
26. ——— There is no requirement that the cars be so equipped that such air hose or safety chains can be disconnected without going between the cars. *Id.*..... 774
27. Negligence—No Buffer Appliances on Cars—No Liability Established. Where a railroad is not required to equip its cars with buffer appliances for the protection of brakemen, findings that the negligence consisted in the failure to equip with buffer and buffer appliances do not establish liability. *Id.*..... 774
28. Negligence—Personal Injuries—Proper Special Questions. In an action to recover for injuries negligently inflicted it is proper to request the jury to find what the defendant's acts of negligence were. *Eastman v. Railway Co.*..... 400
29. ——— A submitted question examined and not found to contain any pitfall or trap for the unwary juror. *Id.*..... 400
30. Personal Injuries—Negligence Alleged Not Proven. The plaintiff alleged that the defendant's roadmaster directed him to board a car which it had negligently left in an unsafe condition. The jury found the negligence to consist of the direction of the roadmaster to board the car. Held, that as the negligence charged was not proved the plaintiff cannot recover. *Id.*..... 400
31. Tortious Act of Servant—Liability of Principal. A master is responsible for the tortious acts of his servant where such acts are incidental to and done in furtherance of the business of the master, even if such acts are done willfully or in excess of the authority conferred. *Mansfield v. Detective Agency*..... 687
32. Unprotected Railroad Repair Shops—Contributory Negligence—Assumption of Risk. Where a car repairer was injured by being blown from the top of a car which he was repairing in railroad shops not provided with sheds as required by statute he was neither guilty of contributory negligence nor did he assume the risk. *Defenbaugh v. Railroad Co.*..... 569
33. Unprotected Railroad Repair Shops—Injury to Employee. A railroad is liable for injuries sustained by a car repairer who was blown from a car which he was repairing in regular shops on tracks exclusively used for repair work, but which shops were not protected by sheds as required by statute. *Id.*, 569

MECHANICS' LIENS—See BONDS, 13.

## MERGER:

1. Mortgage—Deed from Mortgagor to Mortgagee—Mortgagor Released—Mortgage Lien Kept Alive. For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor, or of any one else, for satisfaction of the debt. *James v. Williams*..... 231
2. ——— Where the holder of a lien on real estate acquires the legal title to the property, with the intention that such lien shall not merge in the legal title, such intention will prevail as against junior incumbrances. *Id.*..... 231

## MINES AND MINERALS:

1. **Contract—To Execute Oil and Gas Lease—Within Statute of Frauds.** A contract to execute an oil and gas lease granting the right to explore, and if mineral be found, to produce and sever, is a contract for the sale of an incorporeal hereditament, within the meaning of the sixth section of the statute of frauds. *Robinson v. Smalley*..... 842
2. ——— A contract by a husband, whereby for a consideration he agrees to procure his wife to sign an oil and gas lease of the character described, need not be in writing to be actionable. *Id.* ..... 842
3. **Gasoline for Coal Oil—Agency of Seller Established.** In an action to recover damages resulting from a substitution of gasoline for coal oil by the salesman of an oil and gasoline company the agency of the salesman was sufficiently established by the evidence. *Harlow v. Propes*..... 424
4. **Mining Coal—Subsidence of Surface—Damages—Limitation of Actions.** An action for damages caused by the subsidence of the surface of land, brought about by mining coal therefrom, is not barred by the statute of limitations until two years have elapsed after the surface has subsided. *Walsh v. Fuel Co.*..... 29
5. **Mining Coal—Unambiguous Contract—Interpretation for Court.** Where a contract is not ambiguous and there is no charge of fraud accident or mistake the intention of the parties must be ascertained from the contract, and its construction is a matter of law for the court. *Id.*..... 29
6. **Oil and Gas Company Lease—Forfeiture—Garnishment of Assets—Rights of Creditors.** Where an oil and gas company began drilling a well on leased premises and then abandoned the lease, leaving their drilling outfit on the leased premises, such drilling outfit became subject to garnishment in the hands of the lessor by the company's creditors. *Hardware Co. v. Oil & Gas Co.*..... 144
7. **Oil and Gas Lease—Failure to Develop—Lessor's Remedy—Damages—Forfeiture.** Where an oil and gas lease embraced two separate tracts of land and the lessee failed to develop one of the tracts for fourteen years the lessor may recover damages for delay and the lessee be required to develop the tract within reasonable time under penalty of forfeiture of the lease. *Alford v. Dennis*..... 403
8. **Oil and Gas Lease—Group of Buyers—Title in Trust for All—Innocent Purchasers.** Where an oil and gas lease is executed to a member of a group of buyers, who takes title for the benefit of all, one who buys from the trustee with notice of the trust acquires no beneficial title against the actual owners. *Goss v. Rothrock*..... 272
9. **Oil and Gas Lease—Improvident Contract—Cancellation—Forfeiture.** Equity will not cancel a contract which is merely a bad or improvident bargain, nor will equity arbitrarily declare a forfeiture for breach of an implied contract. *Alford v. Dennis* ..... 403
10. **Oil and Gas Lease—No Conveyance of Real Estate.** The provisions of an oil and gas lease examined and held the instrument did not operate to sever and convey as real estate subsurface mineral deposits. *Hover v. McNeill* ..... 492
11. **Oil and Gas Lease—Oral Contract—Statute of Frauds—Trusts.** Where an oil and gas lease negotiated by several lessees is made to one of them as trustee for the benefit of all, and each

## MINES AND MINERALS—CONTINUED:

- of the groups of buyers subsequently paid his share, their claims cannot be defeated on the ground that the transaction was within the statute of frauds. *Goss v. Rothrock*..... 272
12. ——— Neither the trustee holding title for the benefit of buyers of an oil lease, nor any purchaser from him with notice, can defeat the trust on the ground that it was not created or evidenced by writing. *Id.*..... 272
13. Oil Lease — Sale by Trustee — Ratification by Owners — Estoppel. Where a trustee makes a sale of an oil lease, a beneficial owner of the lease who elects to look to such trustee for his share of the purchase price thereby ratifies the sale, and is estopped from claiming title as against the purchaser at such sale. *Id.*..... 272
14. Oil Refinery — Lawful Business — Liability for Damages to Neighbor. The fact that the business of an oil refinery is in itself a lawful one and that the owner of it operates it carefully, will not exempt him from liability for casting oil, refuse and poisonous substances on the land of the plaintiff in such quantities as to cause him substantial injury. *Helms v. Oil Co.*..... 164
15. ——— The liability of the defendant in such a case is measured by the rules in relation to a nuisance instead of those governing cases of negligence. *Id.*..... 164
16. Substitution of Gasoline for Coal Oil—Fire in Cook Stove—Evidence. Whether or not the plaintiff was negligent in using what he supposed to be coal oil in starting a fire in his cook stove was a question of fact properly submitted to the jury. *Harlow v. Propes*..... 424
17. ——— The substitution of gasoline for coal oil held to have been the proximate cause of the injury complained of. *Id.*.... 424

## MINORS:

1. Contract—To Make Minor an Heir—Insufficient Evidence. In an action to compel specific performance of a contract to leave all defendant's property to plaintiff the evidence did not prove the contract alleged in plaintiff's petition. *McKeown v. Carroll*..... 826
2. Injuries to Minor Son—Compromise by Father—Judgment by Consent—Parent's Authority. Where a minor had sustained personal injuries which his father and the wrongdoer settled for an inadequate sum, such minor on attaining his majority may bring an action against the wrongdoer for his injuries notwithstanding the settlement negotiated by his father. *Leslie v. Manufacturing Co.*..... 159
3. ——— An inadequate settlement by a father for injuries to his minor son does not bar an action by the son for such injuries on attaining his majority, although the father consented to a formal judgment therefor in a city court. *Id.*.... 159

## MOB VIOLENCE:

1. Mob Violence — Death — Pleadings — Evidence. In an action against a city to recover damages in consequence of the action of a mob, the petition is held sufficient to state a cause of action, and the plaintiff's evidence is held sufficient as against a demurrer. *Harvey v. City of Bonner Springs*..... 9
2. ——— It is held that the court committed no error in refusing to direct a verdict for the defendant. *Id.*..... 9

**MOB VIOLENCE—CONTINUED:**

3. **Mob Violence—Death While Resisting Arrest—Good Faith of Officers Question for Jury.** In an action for damages for death while deceased was resisting arrest by a marshal's posse, the question of the good faith of the city officers, and whether the posse constituted a mob under the statute, were for the jury. *Id.* ..... 9
4. ——— Under the facts stated in the opinion and under the evidence a verdict for the plaintiff against the city for \$8,500 will not be disturbed. *Id.* ..... 9
5. **Mob Violence—Defense—Deceased Resisting Arrest—Instructions.** In an action against a city for damages for a death claimed to have been caused by a mob, where the defense was that the death was caused by the unlawful resistance of the deceased to arrest by the city marshal, the issues then raised were correctly stated in the instructions. *Id.* ..... 9

**MOOT CASES:**

1. **Moot Case—Not Decided.** Case No. 21,088 having become moot is not decided, and the appeal is dismissed. *City of Topeka v. Ritchie* ..... 384

**MORTGAGES:**

1. **Attachment—Land—Defective Sheriff's Return—Return Not Void.** Where a sheriff in his return on an order of attachment described the land seized as "the northeast and northwest quarters of section 22 in township 7, range 38," the return was not void for indefiniteness or uncertainty. *Hodgen v. Roy* ..... 197
2. **Attachment—Mortgage Foreclosure—Concurrent Remedies.** A plaintiff in an action to foreclose a mortgage given to secure payment of an indebtedness may secure the issuance of an order of attachment and the levy of the same upon property other than that included in the mortgage. *Id.* ..... 197
3. **Attachment—Mortgage Foreclosure—Excessive Levy—Attachment Not Void.** Where there is an excessive levy under an order of attachment and the seizure and holding of more property than is necessary to meet a probable judgment, the mere fact that an excessive amount of property is seized and held does not necessarily invalidate the attachment. *Id.* ..... 197
4. **Bankruptcy—Discharge as Affecting Chattel Mortgaged Property.** A discharge in bankruptcy releases a bankrupt from all his debts which are provable in bankruptcy except such as are exempted by the bankruptcy act. *Bank v. Hoffman* ..... 465
5. ——— Where a debt secured by chattel mortgage was presented and allowed against the bankrupt's estate, and the mortgaged property not exempt was sold to satisfy the debt, the discharge of the bankrupt released all the unsold mortgaged property which was exempt, from the lien of the chattel mortgage. *Id.* ..... 465
6. **Bill of Sale—Chattel Mortgage—Not Fraudulent.** Where a debtor while solvent gave her note to attorneys to defend her sons in criminal actions pending against them, and gave a bill of sale of personal property to a third party to procure additional security for the payment of such fees, the bill of sale was not fraudulent as to creditors. *Bank v. Greene* ..... 202
7. **Chattel Mortgage—Conditional Sale by Mortgagee—Sale Invalid—Conversion.** Where the mortgagee takes charge of chattel-mortgaged property and makes a conditional sale of 63—Kan.—1778



## MORTGAGES—CONTINUED:

- the property, such sale is invalid and amounts to conversion by the mortgagee, and he is liable for the fair and reasonable value of the property at the time of such conversion. *Bank v. Wherry* ..... 224
8. Chattel Mortgage—Mortgagee “Deeming Itself Insecure.” In a replevin action under a chattel mortgage proof of a feeling of insecurity was sufficient to support the plaintiff’s allegation that it “deemed itself insecure”—the reasonableness of such feeling being immaterial. *Bank v. Staab*..... 369
9. Chattel Mortgage—Pleadings—Instruction Outside the Issues. In a replevin action to recover wheat under a chattel mortgage an instruction covering fraud and mutual mistake, not pleaded, was improper. *Id.*..... 369
10. Chattel Mortgage Sale—Right of Possession. Where possession of personal property is demanded in an action in replevin it is immaterial whether the right of possession is claimed by the mortgagee under his chattel mortgage or under his purchase of the property at a sale pursuant to the conditions of the chattel mortgage. *Implement Co. v. Willhite*... 56
11. Chattel Mortgage — Value of Property — Evidence — Replevin Affidavit. In a replevin action the replevin affidavit made by the plaintiff was properly admitted on the question of value of the property involved. *Bank v. Staab*..... 369
12. Foreclosure—Error in Judgment—Error Corrected on Appeal. Where a judgment of foreclosure was erroneous but not void, and the sale was confirmed, the defendants were bound by the judgment and they could take advantage of the error only by appeal. *Marsh v. Votaw*..... 747
13. Foreclosure — Sale — Confirmation — Motion to Set Aside — Laches. Where the original judgment of foreclosure was erroneous but not void, and three years after the sale and confirmation defendants filed a motion to set aside the confirmation, and that they be allowed to redeem, the application was made too late to entitle them to relief. *Id.*..... 747
14. Foreclosure Sale—Confirmation Set Aside—Redemption Allowed. In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, held, on the facts stated in the opinion it was error to deny the relief prayed for. *Norris v. Evans*..... 583
15. Insurance—Loss “Payable to Mortgagee”—Change of Title to Insured Property—Policy Void. Where the insured without consent of the insurance company transferred the title to the insured property, the insurance policy, under its terms, was rendered void. *Longfellow v. Insurance Co.*..... 473
16. Mortgage—Deed from Mortgagor to Mortgagee—Mortgagor Released—Mortgage Lien Kept Alive. For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor, or of any one else, for satisfaction of the debt. *James v. Williams*..... 231
17. ——— Where the holder of a lien on real estate acquires the legal title to the property, with the intention that such lien shall not merge in the legal title, such intention will prevail as against junior incumbrances. *Id.*..... 231

## MORTGAGES—CONTINUED:

18. **Mortgage Foreclosure—Attachment—Concurrent Remedies.** A plaintiff in an action to foreclose a mortgage given to secure payment of an indebtedness may secure the issuance of an order of attachment and the levy of the same upon property other than that included in the mortgage. *Hodgen v. Roy* . . . 197
19. ——— The mere fact that a plaintiff in a foreclosure action has asked that his mortgage be foreclosed does not preclude the use of other concurrent and consistent remedies. *Id.* . . . 197
20. **Mortgage Foreclosure—Personal Service—Default Judgment—Jurisdiction.** In a foreclosure action the district court has jurisdiction to render judgment by default, on personal service, without the notes and mortgage sued on being filed with the clerk or presented to the court. *Broquet v. Mosier* . . . 246
21. ——— It is not a fraud on the defendants in a foreclosure action for the plaintiff to fail to file with the clerk or to present to the court the notes and mortgage sued on, or to introduce any evidence in support of the petition, where personal service has been made and judgment is rendered by default. *Id.* . . . 246
22. **Mortgage Foreclosure—Sale—Confirmation—Sheriff's Deed—Attack—Homestead.** Where no appeal has been taken from a decree of confirmation of a sheriff's sale, mere irregularities of the sheriff's sale afford no basis for an attack upon the sheriff's deed issued in pursuance of such confirmation. *Catlin v. Deering & Co.* . . . 256
23. ——— Nor can such deed be attacked on the ground that the land sold was occupied as a homestead and therefore exempt from sale on a general execution. *Id.* . . . 256
24. **Mortgage Foreclosure—Sheriff's Sale—Valid Order of Sale—Void Execution.** A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final the title of the purchaser is not open to attack on the ground of the invalidity of the execution. *Id.* . . . 256
25. **Note and Mortgage—Foreclosure—Defense of Payment.** In an action to foreclose a mortgage where the defense was payment the evidence abstracted was sufficient to sustain the judgment for defendant. *Kurt v. Shupe* . . . 426
26. **Sale—New Contract—Effect of Conditional Sale—No Renewal of Chattel Mortgage.** After a sale and rescission of a contract of purchase of a machine, a new contract of conditional sale of the same machine entered into did not reanimate a chattel mortgage covering the machine, which was extinguished by the former rescission. *Implement Co. v. Willhite* . . . 56
27. **Sale of Threshing Machine—Note and Mortgage—Breach of Warranty—Rescission.** Where a machine is sold with warranty, and notes and chattel mortgage given, and the machine fails to fill the warranty, the purchaser may rescind the contract and thereby effect the extinguishment of the chattel mortgage. *Id.* . . . 56
28. ——— The facts relating to a return of a threshing machine, which has proved altogether worthless for the purpose for which it was bought, examined, and held that there was a substantial compliance with the contract provisions as to the place to which it was to be returned. *Id.* . . . 56

**MOTIONS:**

1. Pleadings — Answer — Notice of Hearing. Answers or other pleadings to a motion are not required, and there is no provision for making up issues for the trial of motions. *Berry v. Dewey* ..... 392

**MOTORCYCLES**—See NEGLIGENCE, 20, 21.

**MOVING PICTURES:**

1. Censorship—Conclusiveness of Determination—Statute—Review. The Kansas board of review has full power to determine whether films offered for its examination and decision are proper for exhibition, and its determination is not open to review unless its action is fraudulent or beyond its jurisdiction. *Photo Play Corporation v. Board of Review*..... 356
2. ——— Under section 15 of chapter 308 of the Laws of 1915, redress for an aggrieved party is not a reexamination of a picture by the court, nor exercise of administrative and non-judicial power, but is such redress as the court may give. *Id.*, 356
3. Moving Pictures—Censorship—Petition to Court for Review—Defective Allegations. In the absence of allegations or proof that the board of review acted arbitrarily or dishonestly it must be presumed that it acted in good faith and that its determination was an honest exercise of its best judgment. *Id.*, 356
4. Moving Pictures—Censorship—When Decision of Board of Review is Conclusive. Where the state board of review of moving-picture films has determined that certain films are immoral and not proper for exhibition, its determination is not open to review by the courts unless its action is fraudulent, arbitrary or in excess of its authority. *Id.*..... 356
5. Tort — Photograph in Moving Picture — Rights of Privacy — Damages. The exhibition in a moving-picture theater of the photograph of a person taken without her consent and for the purpose of exploiting the publisher's business is a violation of the right of privacy and entitles her to recover without proof of special damage. *Kunz v. Allen*..... 883
6. ——— One has the exclusive right to his picture as a property right of material profit, and unless he has expressly or impliedly consented to its use by others he may sue at law for damages for the invasion of the right. *Id.*..... 883

**MUNICIPAL CORPORATIONS:**

1. Boundary of City—City Ordinance—Scope of Title. That portion of a city ordinance which undertakes to exclude territory from the corporate limits is held to be ineffective because the only purpose expressed in the title to the ordinance is "extending the limits of the city." *The State, ex rel., v. City of Hutchinson* ..... 825
2. Boundary of City—Petition in Quo Warranto Construed. A petition in quo warranto against a city charging it with unlawfully refusing to exercise jurisdiction of a tract of land within the corporate limits is construed to allege that such tract had not been excluded from the city. *Id.*..... 825
3. City—Constructing Sewer—Injuries to Workman Not Within Compensation Act. While constructing a sewer a city is not engaged in an enterprise involving any element of gain or profit, and does not come within the terms or operation of the workmen's compensation act. *Redfern v. City of Anthony*, 484
4. City School District—Annexing Adjacent Territory—Notice. The proceedings of a city school district in annexing ad-

MUNICIPAL CORPORATIONS—CONTINUED:

- jacent territory under section 9129 of the General Statutes of 1915 were in conformity to the statute and valid. *School District v. Board of Education*..... 784
5. ——— In annexing adjacent territory to a city school district the validity of the proceedings was not affected by the fact that the school district from which the territory was detached had no notice of the application nor of the resolution annexing such territory. *Id.*..... 784
6. Damages against City—No Claim Filed in Time. The claim for damages not having been filed with the city clerk in the time required by the statute, the judgment in favor of the city must for this reason, regardless of others, be affirmed. *Griffith v. Railway Co.*..... 23
7. Damages — Obstructing Access to City Lots — Findings — Instructions. In an action for damages for obstructing ingress to and egress from city property, certain errors in admitting proof of damages not alleged and in submitting improper special questions to the jury are held not to have been prejudicially erroneous. *Id.*..... 23
8. Drainage District—No Power Over Highways or Highway Culverts. A drainage district has no power to regulate the construction of highways or of highway culverts within the district, but such power over township highways is vested in the township board of highway commissioners. *Drainage District v. Highway Commissioners*..... 535
9. Gas—Street Lighting—Power to Regulate. Power to regulate lighting equipment for city streets where the service to be performed is principally within the city is by the public utilities act reserved to the city and is not vested in the public utilities commission. *Street Lighting Co. v. City of Wichita*.... 4
10. Heavy Vehicles—Planking Bridges—Statute Includes Horse-drawn Wagons. Section 8799 of the General Statutes of 1915, providing that drivers of certain heavy vehicles on a public highway shall plank all bridges and culverts before driving across them, applies to and includes horse-drawn wagons. *White v. Kansas City* ..... 495
11. Injury in Street—Contributory Negligence—Question for Jury. The plaintiff, familiar with conditions and knowing that a plank extended from the pavement to the sidewalk curbing, and who by ordinary care could have seen it, was not guilty of contributory negligence as a matter of law in striking her foot against it with resulting injury. *Weaver v. City of Cherryvale* ..... 475
12. Interurban Railway—Local Service in City—Control of Utilities Commission. Where an interurban railway operating through numerous cities extended its line into a city for local service, the power to require local cars to run to a given point at specified times is by statute vested in the utilities commission, and cannot be controlled by city ordinance. *In re Wright*..... 329
13. Mob Violence — Death — Pleadings — Evidence. In an action against a city to recover damages in consequence of the action of a mob, the petition is held sufficient to state a cause of action and the plaintiff's evidence is held sufficient as against a demurrer. *Harvey v. City of Bonner Springs*..... 9
14. ——— It is held that the court committed no error in refusing to direct a verdict for the defendant. *Id.*..... 9

## MUNICIPAL CORPORATIONS—CONTINUED:

15. **Mob Violence—Death While Resisting Arrest—Good Faith of Officers Question for Jury.** In an action for damages for death while deceased was resisting arrest by a marshal's posse, the questions of the good faith of the city officers, and whether the posse constituted a mob under the statute, were for the jury. *Id.* ..... 9
16. ——— Under the facts stated in the opinion and under the evidence a verdict for the plaintiff against the city for \$8,500 will not be disturbed. *Id.* ..... 9
17. **Mob Violence—Defense—Deceased Resisting Arrest—Instructions.** In an action against a city for damages for a death claimed to have been caused by a mob, where the defense was that the death was caused by the unlawful resistance of the deceased to arrest by the city marshal, the issues then raised were correctly stated in the instructions. *Id.* ..... 9
18. **Negligence—Child Drowned—Judgment Not Excessive.** A judgment for \$3,500 against a city for the wrongful death of a three-year-old child is not excessive to such an extent as to warrant its reduction by an appellate court. *Schaubel v. City of Manhattan* ..... 430
19. **Negligence—Excavations in City Streets—Child Drowned.** Where a city left unguarded excavations and lateral connections in its street, which became filled with water, and a three-year-old child at play fell in and was drowned, the question of the city's negligence was for the jury. *Id.* ..... 430
20. ——— It is the duty of a city to exercise reasonable care to keep children from going near and about flooded excavations in its streets. *Id.* ..... 430
21. **Negligence—Street-car Track—Buggy Overturned—Death—Findings.** In an action for damages for the death of the driver of a buggy occasioned by a street-car track extending above the surface of the street, the findings were not inconsistent with each other, nor with the verdict for plaintiff. *Adams v. Electric Railway Co.* ..... 214
22. **Obstructing Access to City Lots—Inconsistent Findings.** In an action for damages for obstructing access to city property, one finding that the obstruction complained of rendered the street impassable, and another finding that the street was passable, were fatally inconsistent and contradictory. *Griffith v. Railway Co.* ..... 23
23. **Obstructing Access to City Lots—Joint Liability of Defendants.** Under the circumstances shown, the finding that one of the defendants rearranged certain railroad tracks, thereby obstructing travel in the street, did not relieve the other defendant from responsibility therefor. *Id.* ..... 23
24. **Obstructing Street—Cause of Damages as Alleged Not Proven.** It appearing that the cement wall complained of as a barricade did not have the effect to increase the obstruction to travel, it is held that the plaintiff cannot recover on account of the erection of such wall. *Id.* ..... 23
25. ——— From the location of different avenues of approach shown by the record the plaintiff is not shown to have been damaged by the rearrangement of the railroad tracks complained of. *Id.* ..... 23
26. **Paving—Special Assessments—Injunction—Statute of Limitations.** The statutory limitation that an action cannot be maintained to enjoin a special assessment for street improvements unless begun within thirty days after the amount due

MUNICIPAL CORPORATIONS—CONTINUED:

- on property assessed is ascertained, applies to invalidity as well as irregularity in making the assessments. *Park Association v. City of Hutchinson* ..... 488
27. Personal Injuries—Findings—Contributory Negligence. In an action against a city for injuries sustained by a pedestrian striking her foot against the end of a plank the findings of the jury did not as a matter of law convict the plaintiff of contributory negligence. *Weaver v. City of Cherryvale*..... 475
28. Quo Warranto—Proper Proceeding to Determine City Boundaries. The state may maintain quo warranto against a city for the purpose of determining its true boundary, where its fault consists in confining its territorial jurisdiction within too narrow limits as well as where it undertakes to extend them too far. *The State, ex rel., v. City of Hutchinson*..... 325
29. Sewer Contract—Breach—Damages—Surety—Limitation of Actions. In an action by a city against a surety of a contractor to recover costs and expenses incurred and paid by reason of the contractor's misfeasance, costs which accrued and were paid by the city within five years before the action was begun were not barred as to the surety company. *City of Topeka v. Ritchie*..... 384
30. Street Lighting Contract—Defaulted Payments—Interest Thereon. Where a city defaulted under its contract with a street lighting company in making payments the defaulted payments should only draw interest at the legal rate from the dates when they were severally due. *Street Lighting Co. v. City of Wichita*..... 4
31. Street Lighting Contract—Notice of Expiration Not Given—Contract Renewed. In an action upon a contract for street lighting which provided that the contract should continue another term unless sixty days' notice be given of intention to terminate, the evidence failed to show giving of the notice by either party or a waiver thereof, and the contract was renewed. *Id.* ..... 4
32. Town Site—Control of Levees and Streets—Cannot be Devested by City. A city cannot by executing a deed of conveyance to a part of a public levee disable itself in its public municipal power nor relinquish its public municipal duty to control the property for the public good. *Douglas County v. City of Lawrence*..... 656
33. Town Site—Control of Levees and Streets—Vested in City. The lawful possession, dominion and control of all levees, streets and the like, dedicated to the public by the founders of a town site, are vested in the city by operation of law. *Id.*, 656
34. Town Site—Levees and Streets Dedicated—Fee in County in Trust. When the founders of a city or town execute, file and record the plat of the property devoted by them to town site purposes, the fee title of the levees, streets, alleys, parks and the like vests in the county forever in trust for the public by operation of law. *Id.*..... 656
35. Town Site—Levees—Nonuse—Adverse Possession—Statute of Limitations. Duties and privileges conferred and imposed upon a municipal corporation and exclusively for the public benefit cannot be lost through nonuse, estoppel or adverse possession, and statutes of limitation are not ordinarily applicable thereto. *Id.*..... 656

MUTUAL MISTAKE—See DEED, 8, 9; WORKMEN'S COMPENSATION ACT, 15.

## N.

## NEGLIGENCE:

1. Action on Tort—New Action on Contract—Statute of Limitations. An action for damages resulting from negligence is not the same as one on a contract of settlement, and the pendency of an action founded on such a contract does not suspend the running of the statute of limitations against an action on the tort. *Thompson v. Railway Co.* ..... 668
2. Automobile Crossing Railroad—Obstruction to View—Duty of Driver—Contributory Negligence. Where an auto driver is about to cross a railroad track at a place where his view is obstructed, it is his duty, before driving upon the track, to stop, look and listen, or otherwise assure himself of the fact that he can cross in safety. *Williams v. Electric Railroad Co.*, 268 .
3. ——— An auto driver who attempted to cross a railway track where his view was obstructed, without stopping and ascertaining whether he could cross in safety, was guilty of contributory negligence barring recovery for damages from a collision. *Id.* ..... 268
4. Automobile Crossing Railroad—Trolley Car Violating Speed Ordinance—Negligence. A breach of a speed ordinance of a city by an interurban trolley car is negligence *per se*; but to subject the owner of the trolley car to liability for the violation of the city ordinance in a damage suit by a private litigant, it must appear that the disobedience of the ordinance caused or aggravated the damages. *Id.* ..... 268
5. Automobile—Collision—Verdict—Judgment. In an action for damages arising from a collision of automobiles a verdict and judgment supported by substantial, though conflicting, evidence will not be disturbed. *Biernacki v. Ratzlaff* ..... 573
6. ——— Evidence examined and held sufficient to support a verdict and judgment for damages arising from a collision of automobiles on the public highway. *Id.* ..... 573
7. Automobile—Collision with Street Car—Proximate Cause. Where the proximate cause of a collision between a street car and an automobile was the unlawful speed at which the automobile was being driven, the plaintiff, who was an occupant, but not the driver of the automobile, was guilty of contributory negligence. *Fair v. Traction Co.* ..... 611
8. Automobile—Negligence of Driver—No Imputed Negligence to Minor Son. The negligence of a father in driving an automobile across a railroad track without stopping, looking or listening, cannot be imputed to his ten-year-old son who is riding with him. *Burzio v. Railway Co.* ..... 287
9. Automobile—Owned in Partnership—Injury to Third Party—Liability of Partners. Where a father and son owned an automobile in partnership, and the son while driving the car and engaged in his own separate business injured a third party, the father, who was not present, was not liable for the injuries. *Knight v. Cossitt* ..... 764
10. Automobile—Personal Injuries—No Error in Record. Various assignments of error relating to evidence, instructions, special findings, and the general verdict, considered, and held none of them is sufficient to warrant a reversal. *Cusick v. Miller* ..... 663
11. Automobile Races—Injury to Boy—Contributory Negligence. Whether a boy ten years old, of average intelligence, while attending automobile races, and who occupies a dangerous place

NEGLIGENCE—CONTINUED:

- after repeated warnings of danger, is guilty of such contributory negligence as will bar his recovery for injuries received is a question for the jury. *Scott v. Fair Association*..... 653
12. Automobile—Running Down Pedestrian—Contributory Negligence. A pedestrian arriving at a street intersection which he desires and attempts to cross is not necessarily guilty of contributory negligence because he does not look behind him for approaching automobiles. *Cusick v. Miller*..... 663
13. Bridge—Defective Guard Rails—Injuries—Evidence—Findings. In an action against a township for injuries caused by a defective guard rail on a township bridge, the evidence supported the findings of the jury, and judgment against the township cannot be disturbed. *Holcomb v. Clifton Township*, 44
14. Car Repairer—Not Engaged in Interstate Commerce. A car repairer was not engaged in interstate commerce while working on a car which was being repaired in railroad shops and not in use in any kind of transportation. *Defenbaugh v. Railroad Co.* ..... 569
15. Defective Engine—Fire Loss—Evidence—Train Records—Weight of Such Evidence. Although the train sheets and records of a railway company show that no engine or train was operated at or near the place where a fire occurred, this court cannot weigh such evidence against evidence of other witnesses who testified that they saw an engine operating there at that time. *Smith v. Railway Co.*..... 150
16. Gasoline for Coal Oil—Agency of Seller Established. In an action to recover damages resulting from a substitution of gasoline for coal oil by the salesman of an oil and gasoline company, the agency of the salesman was sufficiently established by the evidence. *Harlow v. Propes*..... 424
17. Injuries—Railroad Crossing—Findings—Instructions. Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms state facts and not conclusions of law. *Burzio v. Railway Co.*..... 287
18. Joint Tort-Feasors—Compromise with Part of Them. On an oral compromise with several joint tort-feasors, a reservation of the right to proceed against the other joint tort-feasors may be made orally. *Scott v. Fair Association*..... 653
19. Lease—Breach of Covenant to Repair—Personal Injuries—Contributory Negligence. Where a tenant knows that a porch is in need of repair but continues to use it and is injured thereby, she is guilty of contributory negligence notwithstanding the landlord had promised to repair the porch but failed to do so. *Murrell v. Crawford*..... 118
20. Motorcycle—Exceeding Speed Limit—Frightening Team in Adjacent Field. Where a farmer's team hitched to a binder in a field adjoining a public highway became frightened by the noise of a motorcycle running along the highway at a rate exceeding the statutory speed limit, the driver of the motorcycle was not liable for the consequent damages. *Walker v. Faelber* ..... 646
21. Motorcycle—Operation on Highway—Construction of Statute. Chapter 65 of the Laws of 1913, making it unlawful for any person to operate a motorcycle on a public highway at a



## NEGLIGENCE—CONTINUED:

- greater rate of speed than twenty-five miles per hour was intended solely for the protection of others using such highway. *Id.*..... 646
22. Negligence—Action Dismissed—New Action—Limitation of Actions. A plaintiff whose action is disposed of otherwise than on the merits cannot in a new action brought within a year engraft causes that are barred upon causes pleaded in the first action that are not barred. *Brice-Nash v. Street Railway Co.*..... 36
23. ——— Herein it is held that the cause of action stated in the second action is substantially the same as that pleaded in the first. *Id.*..... 36
24. Negligence—Allegations—Proof. In an action for injuries, two of the three alleged grounds of negligence being based on matters not required of the defendant, and the other having failed of proof, the plaintiff cannot prevail. *George v. Railway Co.*..... 774
25. Negligence—Car Equipment Required for Protection of Brakemen. A train is required to have eighty-five percent of its cars equipped with air brakes, so that it can be operated by the engineer, thus rendering it necessary to have certain of its cars connected by air hose. *Id.*..... 774
26. ——— There is no requirement that the cars be so equipped that such air hose or safety chains can be disconnected without going between the cars. *Id.*..... 774
27. Negligence—Child Drowned—Judgment Not Excessive. A judgment for \$3,500 against a city for the wrongful death of a three-year old child is not excessive to such an extent as to warrant its reduction by an appellate court. *Schaubel v. City of Manhattan.*..... 430
28. Negligence—Excavations in City Streets—Child Drowned. Where a city left unguarded excavations and lateral connections in its street, which became filled with water, and a three-year-old child at play fell in and was drowned, the question of the city's negligence was for the jury. *Id.*..... 430
29. ——— It is the duty of a city to exercise reasonable care to keep children from going near and about flooded excavations in its streets. *Id.*..... 430
30. Negligence—Injuries—Proximate Cause—Question for Jury. Negligence to be the proximate cause of an injury must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result. *Walsley v. Telephone Association.*..... 139
31. Negligence—No Buffer Appliances on Cars—No Liability Established. Where a railroad is not required to equip its cars with buffer appliances for the protection of brakemen, findings that the negligence consisted in the failure to equip with buffer and buffer appliances do not establish liability. *George v. Railway Co.*..... 774
32. Negligence—Personal Injuries—Proper Special Questions. In an action to recover for injuries negligently inflicted it is proper to request the jury to find what the defendant's acts of negligence were. *Eastman v. Railway Co.*..... 400
33. ——— A submitted question is examined and not found to contain any pitfall or trap for the unwary juror. *Id.*..... 400

## NEGLIGENCE—CONTINUED:

34. Negligence—Railroad Crossing—Obstruction to View. Liability of a railroad company for injuries sustained in a collision between an automobile and a railroad car may be founded on negligence in allowing weeds, grass and brush to grow so as to obstruct the vision of those approaching the railroad crossing. *Burzio v. Railway Co.*..... 287
35. Negligence—Street Car Track—Buggy Overturned—Death—Findings. In an action for damages for the death of a driver of a buggy occasioned by a street-car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.*..... 214
36. Negligence—Telephone Wires—Injuries—Prima Facie Case—Burden of Proof. Where a plaintiff has proved that he sustained injuries through the dangerous situation of a telephone wire hanging across a public highway the burden passes to the telephone company to show facts excusing the dangerous condition of the highway. *Walmsley v. Telephone Association.*..... 139
37. Negligence—Trial—No Prejudicial Error in Record. The record, in an action to recover damages for personal injuries sustained through the negligent maintenance of a telephone wire across a public highway, examined and no prejudicial error discerned therein. *Id.*..... 139
38. Negligence—Two Acts of Negligence—Findings Sufficient. Where a jury by special questions were required to specify what particular act or acts of negligence caused the fire, answers specifying "careless handling of the engine or defective condition of the smokestack of the engine" were, under the evidence, sufficient. *Smith v. Railway Co.*..... 150
39. Negligence—Verdict—Findings—Interpretation. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Railway Co.*..... 287
40. Negligence—Weight of Certain Evidence—Improper Instructions. A certain instruction relative to comparative weight of the evidence of one who testified he saw an engine, and that of witnesses who testified that they did not see such engine, should not have been given. *Smith v. Railway Co.*..... 150
41. Personal Injuries—Findings—Contributory Negligence. In an action against a city for injuries sustained by a pedestrian striking her foot against the end of a plank the findings of the jury did not as a matter of law convict the plaintiff of contributory negligence. *Weaver v. City of Cherryvale.*..... 475
42. Personal Injuries—Findings—Verdict—New Trial at Subsequent Term. Where at a subsequent term the court granted a new trial because of certain findings, no motion therefor having been filed by either party, such ruling is reversible on appeal. *Id.*..... 475
43. Personal Injuries—Negligence Alleged Not Proven. The plaintiff alleged that the defendant's roadmaster directed him to board a car which it had negligently left in an unsafe condition. The jury found the negligence to consist of the direction of the roadmaster to board the car. Held, that as the negligence charged was not proved the plaintiff cannot recover. *Eastman v. Railway Co.*..... 400

## NEGLIGENCE—CONTINUED:

44. Shipper of Stock—Dangerous Position Voluntarily Taken—Railroad Not Liable. Where a shipper of stock riding on a shipper's pass voluntarily placed himself in a position of obvious danger on the side of a moving freight car and was not engaged in looking after the stock in his charge the railroad company is not liable in an action to recover for his death. *Shore v. Railway Co.*..... 542
45. Substitution of Gasoline for Coal Oil—Fire in Cook Stove—Evidence. Whether or not the plaintiff was negligent in using what he supposed to be coal oil in starting a fire in his cook stove was a question of fact properly submitted to the jury. *Harlow v. Propes.*..... 424
46. ——— The substitution of gasoline for coal oil held to have been the proximate cause of the injury complained of. *Id.*.... 424
47. Telephone Wire over Highway—Injuries—Evidence. Negligence in the maintenance of a telephone wire across a public highway is sufficiently established when it is shown that the wire hung so low as to interfere with the customary use of the highway. *Walmsley v. Telephone Association.*..... 189
48. Uninsulated Wires—Children Playing—Injuries—Negligence—Question of Fact. Whether an electric company was guilty of negligence in permitting uninsulated wires along a street in a thickly settled portion of the city, whereby a boy was killed by contact with a small wire thrown over the uninsulated wire thirty feet above the ground, was for the jury. *Strom v. Light Co.*..... 40
49. Uninsulated Wires—Injuries—Trial—Findings Construed. A finding to the effect that a loose wire had been in contact with the wires of an electric light company so long that it ought to have discovered it before the occurrence of an accident was held not supported by the evidence. *Id.*..... 40
50. ——— A finding that the company's wires would not have injured any one using the streets in a way reasonably to have been foreseen, held not to mean that throwing of a loose wire across them could not have been anticipated by the exercise of ordinary caution. *Id.*..... 40
51. Unprotected Railroad Repair Shops—Contributory Negligence—Assumption of Risk. Where a car repairer was injured by being blown from the top of a car which he was repairing in railroad shops not provided with sheds as required by statute he was neither guilty of contributory negligence nor did he assume the risk. *Defenbaugh v. Railroad Co.*..... 569
52. Unprotected Railroad Repair Shops—Injury to Employee. A railroad is liable for injuries sustained by a car repairer who was blown from a car which he was repairing in regular shops on tracks exclusively used for repair work, but which shops were not protected by sheds as required by statute. *Id.*..... 569

## NEGOTIABLE INSTRUMENTS:

1. Attachment—Bill of Sale—Not Fraudulent. Where a debtor while solvent gave her note to attorneys to defend her sons in criminal actions pending against them, and gave a bill of sale of personal property to a third party to procure additional security for the payment of such fees, the bill of sale was not fraudulent as to creditors. *Bank v. Greene.*..... 202
2. Attachment—Bill of Sale—Security for Future Advances—Not Fraudulent. Where a bill of sale was given to secure *bona fide* indebtedness and for indefinite future outlays of

NEGLIGENCE—CONTINUED:

- money for the support of the debtor until her finances mended, the inclusion of future advances did not, of necessity, render the bill of sale fraudulent. *Id.*..... 202
3. Attachment—Bill of Sale—To Secure Attorney's Fees—Good Faith. Where attorneys are employed to represent accused persons in specified criminal actions then pending, they can take and hold security for their fees given in good faith and not as a ruse to hinder delay or defraud creditors. *Id.*..... 202
4. Life Insurance—Payment of Premium Note Assumed by Agent—Note in Default—Policy Valid. Where the security for payment of an insurance premium note was not satisfactory to the company, but the company's local agent assumed and agreed to pay the note, and the note was not paid when due, the policy did not lapse. *Taylor v. Insurance Co.*..... 863
5. Mortgage—Deed from Mortgagor to Mortgagee—Mortgagor Released—Mortgage Lien Kept Alive. For the purpose of accomplishing an equitable result, a mortgage lien may be kept alive and enforced after the lien claimant has placed himself in a position which precludes him from resorting to the personal obligation of the mortgagor, or of anyone else, for satisfaction of the debt. *James v. Williams*..... 231
6. ——— Where the holder of a lien on real estate acquires the legal title to the property, with the intention that such lien shall not merge in the legal title, such intention will prevail as against junior incumbrances. *Id.*..... 231
7. Note and Mortgage—Date when Due Changed—Evidence—Findings. The transcript has been examined and found to contain evidence to afford firm support for the findings and conclusions of the trial court. *Wilhite v. Mason*..... 461
8. Note and Mortgage—Foreclosure—Defense of Payment. In an action to foreclose a mortgage, where the defense was payment, the evidence abstracted was sufficient to sustain the judgment for defendant. *Kurt v. Shupe*..... 426
9. Note—Bill of Particulars—Stated No Cause of Action—Erroneous Judgment. A bill of particulars setting out certain notes with proper allegations to show liability, except an averment of notice of dishonor or waiver thereof, states no cause of action against the indorser. *Investment Co. v. Gamble*..... 791
10. ——— It was error to render judgment for the plaintiff on such bill of particulars. *Id.*..... 791
11. Note—Collateral Security—Innocent Holder. Where a bank received a note as collateral to the payment of another note, as to the maker of the collateral note, the bank which had no knowledge of any infirmities in the collateral note was an innocent holder thereof. *Bank v. Beal*..... 481
12. Note—Conditional Promise to Pay—Impossible Condition—Promissor Released. Whenever subsequent impossibility of meeting the conditions of a contract might readily have been foreseen by the party obligated to perform, he will not be excused from performance on the ground of impossibility. *Carter v. Wilson*..... 200
13. ——— Where a person executed a note for the debt of another on condition that he was to pay only that portion of the debt which a sale of chattel security lacked of paying, and the chattel mortgage was void and no sale could be made, the maker was released from all liability on the note. *Id.*..... 200

## NEGLIGENCE—CONTINUED:

14. Note—Defense of Payment—Findings—Evidence—Agency. In an action on a promissory note executed by defendant and two sureties, a finding that payment was made by defendant to the sureties, and that they were the duly authorized agent of the payee to receive payment is contrary to the evidence and the undisputed facts. *Studebaker Corporation v. Bell*... 259
15. Note—Indorsements—Negotiability Not Destroyed. A note signed by joint makers containing this language: "We, the makers, sureties, endorsers and guarantors, of this note, hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest and consent that time of payment may be extended without notice thereof to any of the sureties of this note" is negotiable. *Bank v. Dickinson* ..... 564
16. ——— There was nothing on such note to indicate that any party thereto was a surety, and the quoted sentence was meaningless and did not render the instrument a courier impeded with luggage. *Id.*..... 564
17. Note—Makers Primarily Liable. Those who sign a promissory note as makers are primarily liable thereon. *Id.*..... 564
18. Note—No Indorsement of Copy in Petition—Amendment. Where the copy of a note attached to a petition failed to show a written indorsement and the case was tried by the parties as if plaintiff was a holder in due course plaintiff should have been allowed to amend his petition to conform to the proof. *Stevens v. Vermillion*..... 408
19. Note—Oral Agreement Varying Indorsement—No Defense. A claim by the indorser of notes that it was orally agreed that if she sold the notes for fifty cents on the dollar, which she did, she would not be called on to pay the notes, is a variance from the written instrument and constitutes no defense. *Investment Co. v. Gamble*..... 791
20. Note—Relationship of Parties—Presumption of Fraud. Failure of consideration and fraudulent purpose in the giving of a note and chattel mortgage will not be presumed because of the relationship of the parties. *Grisier v. Bank*..... 7
21. Note—Variance by Parol. Rule followed that the terms of a plain promissory note cannot be varied by parol. *Bank v. Staab* ..... 369
22. Promissory Note—Mistake—Signed as Maker—Intended as Indorser—Proof. Where no rights of holders in due course or of other innocent parties without notice are involved, it may be established by clear, decided and satisfactory proof that the signing of a promissory note as maker was a mistake and the signing as an indorser was intended. *Rodgers v. Slavens* ..... 1

## NEW TRIAL:

1. Application for Continuance—Bad Faith. The evidence supported the finding of the court that the application for a continuance on account of defendant's sickness was not made in good faith and a new trial was properly refused. *Ladd v. Flato* ..... 312
2. Compensation Act—Judgment—Petition for New Trial—Properly Denied. In an action under the workmen's compensation act the petition of defendant for a new trial on the ground of fraud and newly discovered evidence did not state facts suf-

## NEW TRIAL—CONTINUED:

- ficient to compel the granting of a new trial. *Lombard v. Planing Mill Co.*..... 780
3. Criminal Law—Failure of Wife to Testify—Reference Thereto by County Attorney. In a criminal action it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but, to require a reversal it must appear that some substantial right of the defendant was affected by the error. *The State v. Peterson*..... 900
4. Island Lands — Findings — New Trial Granted — No Error. Where numerous findings were made by a jury, and upon the whole record it appears that a new trial was ordered because the trial judge disagreed with the jury on the facts, the order granting a new trial is not reviewable. *Warner v. Snook* ..... 814
5. — Although the trial court did not set aside the findings of the jury, yet unless it appears from the record that the court approved such findings, this court on appeal from an order granting a new trial will not order judgment on such findings. *Id.* ..... 814
6. Insurance — Loss — Inconsistent Findings — New Trial. The court granted a new trial of the cause because the verdict returned by the jury was not supported by the evidence and because the special findings were inconsistent with each other and with the general verdict. Held, not error. *Tersina v. Insurance Co.* ..... 87
7. Motion for New Trial Properly Denied. The affidavit filed by the defendant Propes was not sufficient to require the granting of a new trial, under the rule that newly discovered evidence must be such as would likely work a different result from that already reached by the jury. *Harlow v. Propes*..... 424
8. Negligence—Findings Contrary to Evidence—New Trial. A verdict of the jury must be set aside where special findings material to its support are determined by the court to be contrary to the evidence. *Brice-Nash v. Street Railway Co.*..... 36
9. New Trial—Newly Discovered Evidence. It is not error to deny a new trial desired for the purpose of producing newly discovered impeaching evidence. *The State v. Fleeman*..... 670
10. — The finding of the district court on affidavits, contradicted by oral testimony, respecting the merits of a motion for a new trial, will not be disturbed on appeal. *Id.*..... 670
11. New Trial—Properly Granted. The proceedings considered, and held, the court did not abuse its discretion in granting a new trial. *Decker v. Bailey*..... 538
12. New Trial—Rejected Evidence—Production on Motion. The provision of the civil code that in order to preserve for review a ruling excluding evidence, the evidence must be produced at the hearing of the motion for a new trial, applies in criminal as well as in civil cases. *The State v. Wellman*..... 503
13. Newly Discovered Evidence—Cumulative. A party is not entitled to a new trial on the ground of newly discovered evidence where the new evidence is of the same kind and goes to the same point as that offered on the trial. *Sheahan v. Kansas City* ..... 252
14. Personal Injuries—Findings—Evidence. The question of the sufficiency of the evidence, while not presented by a motion for a new trial, held to be involved in the decision on the effect of the findings. *Weaver v. City of Cherryvale*..... 475

## NEW TRIAL—CONTINUED:

15. **Personal Injuries—Findings—Verdict—New Trial at Subsequent Term.** Where at a subsequent term the court granted a new trial because of certain findings, no motion therefor having been filed by either party, such ruling is reversible on appeal. *Id.* ..... 475
16. **Report of Referee—"Decision of Court"—Judgment.** The report of a referee determining the whole issue by findings of fact and conclusions of law, separately stated, stands as the decision of the court, and judgment may be entered thereon. *Milling Co. v. Schreiber* ..... 172
17. **Report of Referee—"Decision of Court"—Judgment—Statute.** The word "decision" in section 306 of the civil code, providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue. *Id.* ..... 172
18. **Report of Referee—New Trial Denied—No Appeal—Judgment.** Where judgment was rendered upon the findings of fact and conclusions of law in a referee's report, and grounds for a new trial were not presented in time, and no appeal was taken from an order denying a new trial, the judgment will be affirmed. *Bank v. Bank* ..... 412
19. **Sale of Mechanical Milker—Damages—Findings.** In an action for the purchase price of a milk separator and mechanical milker, the findings of damages in favor of defendant from defects in the articles were not inconsistent nor unsupported by evidence. *Gream Separator Co. v. Abbott* ..... 265

## NOTICE:

1. **City School District—Annexing Adjacent Territory—Notice.** The proceedings of a city school district in annexing adjacent territory under section 9129 of the General Statutes of 1915 were in conformity to the statute and valid. *School District v. Board of Education* ..... 784
2. ——— In annexing adjacent territory to a city school district the validity of the proceedings was not affected by the fact that the school district from which the territory was detached had no notice of the application nor of the resolution annexing such territory. *Id.* ..... 784
3. **Evidence—Affidavits Intended for Use on Trial—Notice to Adverse Party.** Under section 350 of the civil code service of copies of affidavits intended to be used upon the trial is sufficiently made when delivered to the adverse litigant personally at his principal place of business, even though that may be outside the state. *Business Blocks Co. v. Gregory*.. 33
4. **Lease of Hotel—Annual Rent—Nonpayment—Termination of Tenancy—Notice.** To terminate a lease of property for a period of one year on account of the nonpayment of rent, a ten days' notice in writing must be given to the tenant, and such a notice will not terminate the tenancy if the rent is paid before the expiration of the ten days. *Norris v. McKee*..... 63
5. **Motion for Judgment—Pleadings—"Notice of Trial."** There is no statutory provision for making up issues for the trial of motions, and the filing of an answer to a motion for judgment does not require three days' notice of the time of the hearing of such motion. *Berry v. Dewey*..... 392
6. **Shipment of Cattle—Loss—Notice to Carrier.** The contract of shipment required notice of loss or injury during transpor-

## NOTICE—CONTINUED:

- tation or at loading or unloading places on the carrier's road. Held, the contract was concluded with delivery, and notice of loss occurring after delivery was not necessary. *Ott v. Railway Co.* ..... 254
7. **Taxation—Defective Notice of Amount to Redeem—Voidable Tax Deed.** If in a final redemption notice to redeem from tax sale the sum stated as necessary to redeem be substantially greater than the amount properly chargeable under the statutes a tax deed based thereon is voidable. *Jones v. Harper* ..... 539
8. **Written Contract—Provision for Termination—Cannot be Varied by Parol.** An unambiguous written contract for sale of tractors which definitely provided that it might be terminated by either party by giving thirty days' notice in writing could not be contradicted, altered or added to by parol evidence. *Emerson-Brantingham Co. v. Lyons* ..... 733
9. ——— The notice given by one of the parties to the contract in question is held to be sufficient and effective to end the contract relation, and such party did not become liable to the other for damages through the exercise of the option provided for in the contract. *Id.* ..... 733

## "NOTICE OF TRIAL"—See WORKMEN'S COMPENSATION ACT, 10.

## NUISANCES:

1. **Nuisance—Horse and Mule Market—Private Nuisance—Public Nuisance.** A business may be conducted under conditions which will constitute it a private as well as a public nuisance. *Winbiger v. Clift* ..... 858
2. **Nuisance—Petition to Abate Private Nuisance—Sufficient.** On the facts stated in the opinion it was error to sustain a demurrer to the petition in a suit brought by an individual to enjoin the keeping of a horse and mule market in close proximity to his residence. *Id.* ..... 858
3. **Nuisance—Public Nuisance Shown by the Evidence.** The evidence was sufficient to justify a finding that a horse and mule market conducted by the defendant constitute a public nuisance. *Id.* ..... 858
4. **Oil Refinery—Lawful Business—Escaping Gases—Damages to Neighbor.** The fact that the business of an oil refinery is in itself a lawful one and that the owner of it operates it carefully will not exempt him from liability for casting oil, refuse and poisonous substances on the land of the plaintiff in such quantities as to cause him substantial injury. *Helms v. Oil Co.* ..... 164
5. ——— The liability of the defendant in such a case is measured by the rules in relation to a nuisance instead of those governing cases of negligence. *Id.* ..... 164
6. **Replevin of Taxicab—Maintaining Liquor Nuisance—Officers Entitled to Possession.** Where a driver of a taxicab was arrested on the charge of maintaining a liquor nuisance in a taxicab on the public streets, and possession of the taxicab was taken by the police, the taxicab was rightfully in possession of the police and not subject to replevin by the owner. *Allison v. Hern* ..... 48



## O.

## OFFICE AND OFFICERS:

1. **Moving Pictures—Censorship—Petition to Court for Review—Defective Allegations.** In the absence of allegations or proof that the board of review acted arbitrarily or dishonestly, it must be presumed that it acted in good faith and that its determination was an honest exercise of its best judgment. *Photoplay Corporation v. Board of Review*..... 356
2. **Moving Pictures—Censorship—When Decision of Board of Review is Conclusive.** Where the state board of review of moving picture films has determined that certain films are immoral and not proper for exhibition, its determination is not open to review by the courts unless its action is fraudulent, arbitrary or in excess of its authority. *Id.*..... 356
3. ——— The redress for an aggrieved party provided for in section 15 of the act is not a reëxamination of the picture by the court nor the exercise of an administrative and nonjudicial power, but is such redress as a court may give. *Id.*..... 356
4. **Ouster—Clerk of City Court—Former Prosecution—Matters Res Judicata.** A former prosecution for ouster is not a bar to a prosecution for unlawful acts which occurred after the petition in such former action was filed, and which were not included therein. *The State, ex rel., v. Fishback*..... 178
5. **Ouster—Clerk of City Court—Retaining County Money—Pleadings.** A petition for ouster of a clerk of a city court which alleges a willful failure to pay certain funds into the county treasury, as required by section 3310 of the General Statutes of 1915, states a cause of action under section 7603 of the General Statutes of 1915. *Id.*..... 178
6. ——— A misunderstanding of unambiguous statutes is no defense to an action of ouster based upon a willful violation of such statute. *Id.*..... 178
7. **Reward—Apprehending Criminal—Nonpay Deputy Sheriff May Earn Reward.** The evidence was sufficient to prove a contract to pay a reward for discovering, locating and apprehending a criminal. *Smith v. Fenner* ..... 830
8. ——— The right of a public officer to claim a reward for doing his duty, discussed. *Id.*..... 830
9. ——— A nonpay deputy sheriff who was under no official duty to discover and apprehend a thief is not barred by any rule of public policy from claiming a reward offered for the capture of a thief. *Id.*..... 830

OIL AND GAS—See MINES AND MINERALS, 6-15.

## OUSTER:

1. **Ouster—Clerk of City Court—Former Prosecution—Matters Res Judicata.** A former prosecution for ouster is not a bar to a prosecution for unlawful acts which occurred after the petition in such former action was filed, which were not included therein, and which were not passed on in that action. *The State, ex rel., v. Fishback*..... 178
2. **Ouster—Clerk of City Court—Retaining County Money—Pleadings.** A petition for ouster of a clerk of a city court which alleges a willful failure to pay certain funds into the county treasury, as required by section 3310 of the General Statutes of 1915, states a cause of action under section 7603 of the General Statutes of 1915. *Id.*..... 178

## OUSTER—CONTINUED:

3. ——— A misunderstanding of unambiguous statutes is no defense to an action of ouster based upon a willful violation of such statute. *Id.*..... 178

## P.

## PARENT AND CHILD:

1. Injuries to Minor—Settlement by Father—Disaffirmance of Settlement. A minor employee sustaining personal injury, which his father and employer settled for an inadequate sum, on attaining his majority may disaffirm the settlement and bring an action against the employer for his injuries. *Leslie v. Manufacturing Co.*..... 159
2. Nonsupport of Child—Accused Absent from State—Jurisdiction of Kansas Courts. Where a father accused of nonsupport of a child is surrendered by another state to Kansas as a fugitive from justice, the fact that the accused had not been in this state at the time of the alleged offense, nor since then, does not deprive the Kansas court of jurisdiction to try him for the offense. *The State v. Wellman.*..... 503
3. ——— A person who has never been in this state may, under some circumstances, be convicted here of a violation of the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his children under the age of sixteen years who are in destitute circumstances. *Id.*..... 503
4. Nonsupport of Child—Child Supported by Others—No Defense of Parent. In a prosecution of a parent for nonsupport of his child, the fact that the necessities of the child are being supplied by strangers is no defense. *Id.*..... 503
5. Nonsupport of Child—Nonresident Parent—Resident Child—Statute. Where a nonresident parent neglects to support his minor child living in this state, and leaves it in necessitous circumstances, he is guilty of violation of the Kansas desertion act, although he is not in Kansas at the time of the alleged offense. *Id.*..... 503
6. ——— Where such nonresident of Kansas comes or is brought into this state, either voluntarily or involuntarily, he may be arrested and punished under the Kansas statute for nonsupport of his destitute child. *Id.*..... 503

## PAROL EVIDENCE—See EVIDENCE, 23.

## PARTIES:

1. Factory Act—Death—Widow May Maintain Action. When no personal representative has been appointed a widow may maintain an action under the factory act for the death of her husband. *Jeffries v. Elevator Co.*..... 811
2. Judgment on Creditor's Bill—Only Parties Affected Thereby. A judgment against the defendant in a suit in the nature of a creditor's bill will not inure to the benefit of another creditor of defendant who is neither party nor privy to the judgment. *Kinkel v. Chase* ..... 275

## PARTITION:

1. Deed by Wife—Nonjoinder of Husband—Husband's Interest Not Conveyed. Where a wife conveyed land owned by her, without her husband joining in the deed, and the land not having been a homestead nor sold for payment of debts, the husband upon the decease of the wife became absolute owner of one-half interest in such land. *Murray v. Murray.*..... 184

**PARTITION—CONTINUED:**

2. ——— The plaintiff's allegation that the wife was unduly influenced was immaterial, as she could not convey his interest in the land without his consent. *Id.*..... 184
3. **Homestead—Occupied by Widow Alone—Not Subject to Partition.** A homestead occupied by a childless testator and his wife, and thereafter occupied by his widow, who elects to take under the law, cannot be partitioned without her consent, at the suit of collateral heirs. *Breen v. Breen* ..... 766

**PARTNERSHIP:**

1. **Automobile—Owned in Partnership—Injury to Third Party—Liability of Partners.** Where a father and son owned an automobile in partnership, and the son while driving the car and engaged in his own separate business injured a third party, the father, who was not present, was not liable for the injuries. *Knight v. Cossitt*..... 764

**PATENTS:**

1. **Implied Contract—Use of Patented Invention—Jurisdiction of State Courts.** An action by the owner of a patent to recover on an implied contract for use of a patented invention, with patentee's knowledge and consent, is not an action for the infringement of a patent, and the state courts have jurisdiction, notwithstanding the answer pleads the invalidity of the patent. *Ridgway v. Wetterhold* ..... 217

**PAVING—See MUNICIPAL CORPORATIONS, 26.**

**PAYMENTS—See INTEREST, 5; NEGOTIABLE INSTRUMENTS, 14.**

**PERPETUITIES—See WILLS, 14-16.**

**PHOTOGRAPHS—See MOVING PICTURES 6, 7.**

**PLEADING AND PRACTICE:**

1. **Action on Contract—Judgment on Pleadings—Improper.** The petition alleged ownership by the plaintiffs of a certain lease, a part of the consideration for the written instrument sued on. The answer pleaded failure of consideration and contained a general denial. Held, that it was error to render judgment for plaintiffs on the pleadings. *Lesem v. Harris*... 222
2. **Agency—Commissions—Fraud—Separate Trials—Burden of Proof.** In an action by a real-estate agent for commissions where the question of fraud was involved there was no abuse of discretion in refusing separate trials of the issues. *Prather v. Eden* ..... 545
3. ——— The burden of proving fraud was properly placed on the party alleging it. *Id.*..... 545
4. ——— There was no error respecting instructions or in refusing a new trial. *Id.*..... 545
5. **Application for Continuance—Bad Faith.** The evidence supported the finding of the court that the application for a continuance on account of defendant's sickness was not made in good faith and a new trial was properly refused. *Ladd v. Flato* ..... 312
6. **Arson—Expression Used by Defendant—Inferences for Jury.** No error was committed in refusing to allow a witness to testify as to what he understood a person to mean by an expression he had used. *The State v. Heitman*..... 693
7. **Arson—Instructions—Burden of Proof—Presumptions.** On a trial for arson the instructions as a whole showed explicitly

## PLEADING AND PRACTICE—CONTINUED:

- that the burden of proof was on the state, that it did not shift, and that the defendant was presumed to be innocent until the contrary was proven. *Id.*..... 698
8. Assault—Conspiracy—Instructions. An instruction is not to be condemned by separating from its context language in one part of it and ignoring the instruction as a whole. *Drysdale v. Wetz* ..... 680
9. ——— Objections to certain instructions examined and held to be without merit, the abstract making no reference to the other instructions given. *Id.*..... 680
10. Assault—Conspiracy—Order of Proof—Judicial Discretion. In an action for damages resulting from a conspiracy to assault there was no prejudicial error in the admission of declarations made by one of the conspirators before proof of the conspiracy, where subsequent evidence sufficiently established the conspiracy alleged. *Id.*..... 680
11. Attorney's Lien—Application for Allowance—Affidavits—Cross-examination of Affiants. An application for the distribution of a fund against which several attorneys' liens are claimed is a motion, and the code permits the use of affidavits at the hearing thereof. *Ricardo v. Coal & Coke Co.*..... 170
12. ——— An attorney whose claim of lien is denied because the court is convinced that he has performed no services entitling him thereto has no standing to complain of the refusal to allow him to cross-examine the makers of affidavits used in behalf of other claimants. *Id.*..... 170
13. Bastardy—Uncontradicted Evidence—Province of Jury. A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they find to be unreliable, although it may be uncontradicted. *The State, ex rel., v. Woods*..... 499
14. Benefit Insurance—Jury in Advisory Capacity Only—Effect of Improper Evidence. Where a jury is called in an advisory capacity only, a judgment will not be reversed for admission of incompetent evidence unless it appears that the improper evidence affected the result. *Sipe v. Sipe*..... 742
15. "Bond to Quiet Title"—Demurrer to Evidence—Sustained. In an action upon a bond given by defendant to plaintiff "to quiet title" to certain described lands the evidence supported the findings that the conditions of the bond had been performed by defendant. *Snodgrass v. Snodgrass*..... 281
16. "Bond to Quiet Title"—Evidence of Value of Certain Land—Properly Rejected. In an action on a bond to quiet title, where the testimony showed that the plaintiff was not entitled to forty-six acres of the land in controversy, it was not error to reject evidence of its value or evidence of the value of the land deeded in consideration of the bond sued on. *Id.* ..... 281
17. "Bond to Quiet Title"—Misdescription of Land—Reformation. Where there was a mistake in the description of land as given in a "bond to quiet title" and no reformation was asked, it was not prejudicial error for the trial court to treat the bond as reformed to correspond with the facts proven. *Id.*..... 281
18. "Bond to Quiet Title"—Tender of Quitclaim Deed—Sufficient Performance. In an action upon a bond given "to quiet title"

## PLEADING AND PRACTICE—CONTINUED:

- to certain described lands a tender of a quitclaim deed which quieted the title in plaintiff to all the land he could rightly claim was a sufficient performance of the conditions of the bond. *Id.*..... 281
19. "Bone-dry Law"—Information—Negative Allegations. Under the "bone-dry law" (Laws 1917, ch. 215) it is not necessary that an information should allege that the defendant was not a druggist or registered pharmacist. *The State v. Perello*... 695
20. ——— A negative averment of the matter of an exception or proviso in a penal statute is not necessary in an information, unless such matter enters into and becomes a material part of the description of the offense. *Id.*..... 695
21. Boundary of City—Petition in Quo Warranto Construed. A petition in quo warranto against a city charging it with unlawfully refusing to exercise jurisdiction of a tract of land within the corporate limits is construed to allege that such tract had not been excluded from the city. *The State, ex rel., v. City of Hutchinson*..... 325
22. Chattel Mortgage—Pleadings—Issues. In a replevin action to recover wheat under a chattel mortgage an instruction covering fraud and mutual mistake, not pleaded, was improper. *Bank v. Staab*..... 369
23. Chattel Mortgage Sale—Right of Possession. Where possession of personal property is demanded in an action in replevin it is immaterial whether the right of possession is claimed by the mortgagee under his chattel mortgage or under his purchase of the property at a sale pursuant to the conditions of the chattel mortgage. *Implement Co. v. Willhite*..... 56
24. Compensation Act—Validity of Release—Trial by Jury. In an action under the compensation act to enforce compensation, where the validity of a release or other discharge of liability is involved, either party may, when the case is called for trial, demand a trial of that issue by a jury. *Vogler v. Bowersock*, 456
25. Compromise and Settlement—Rescission—Damages as for Conversion—Petition. In an action for damages for the conversion of goods by a bailee no error is committed in striking from his answer statements amounting to reasons for the conversion, where the facts stated constitute no legal justification. *Tire Co. v. Kirk*..... 418
26. ——— A claim for damages for malicious prosecution in a civil action held to have been properly stricken out. *Id.*..... 418
27. Compromise and Settlement—Rescission of Contract—Pleadings. A petition drawn upon a theory of rescission of a sale held to have been good against a demurrer on the ground that it states a cause of action for conversion. *Id.*..... 418
28. Condemnation Proceedings—Award of Damages—Appeal Bond. Where landowners attempted to appeal from the award of damages in condemnation proceedings by a school district, and the appeal bond, though insufficient, was not void, it was error for the court to refuse the tender of a sufficient bond. *Wood v. School District*..... 78
29. Condemnation Proceedings—Not a "Quotient Verdict." Where each juror set down his estimate of damages, and these were added and the amount divided by twelve, and the jury finally reached a verdict materially different from the quotient; the verdict was not a "quotient verdict." *Schaake v. Railway Co.*, 470

PLEADING AND PRACTICE—CONTINUED:

30. Continuance—Insufficient Grounds Shown. The defendants applied for a continuance on the ground that one of their attorneys was a member of the legislature and could not be present at the trial because the legislature was in session. The application was properly denied. *Berry v. Dewey*..... 593
31. ——— An application for continuance by a party on the ground that he desired to attend the trial as a witness, and was prevented by sickness in his family, unsupported by any sworn testimony, was properly denied. *Id.*..... 593
32. Continuance Refused—No Abuse of Discretion. There was no abuse of discretion in the refusal to grant a continuance on account of absent witnesses, because no diligence was shown. *Berry v. Dewey* ..... 392
33. Contract—Ambiguity—Explanation Admissible. The terms of a contract being open to more than one interpretation, testimony of the circumstances surrounding the execution of the contract may be admitted to aid in its interpretation and in ascertaining the intended meaning. *Contracting Co. v. Railway Co.* ..... 799
34. Contract—Building Tunnel—Amendment to Petition—No New Action. The several breaches of the entire contract upon which the action was brought constitute only a single cause of action, and an amendment to the petition setting up an additional item is not barred by the statute of limitations. *Id.* ..... 799
35. Criminal Law—Failure of Wife to Testify—Reference thereto by County Attorney. In a criminal action, it is error for the county attorney to refer to the fact that the defendant's wife did not testify; but, before a judgment will be reversed it must appear that some substantial right of the defendant was affected by the error. *The State v. Peterson*..... 900
36. Deed—Breach of Warranty—Mutual Mistake—Instructions. In an action for breach of warranty against incumbrances it is not prejudicial error for the court to fail to instruct the jury that the execution of the deed and the existence of the incumbrances are admitted, where it conclusively appears that neither of these facts was questioned during the trial. *Zuspann v. Roy* ..... 188
37. Demurrer to Evidence Sustained—Time for Appeal. To review a ruling of the court sustaining a demurrer to plaintiff's evidence and giving judgment for the defendant, it is necessary that the appeal be taken within six months after the ruling is made, and the filing of a motion for a new trial does not operate to extend the time for such appeal. *Sheahan v. Kansas City* ..... 252
38. Descents and Distributions—Action by Widow—Insufficient Allegations. The petition considered, and held to contain no allegation of a contract whereby, in consideration of the surrender of the wife's marital interest in land sold by her husband, he agreed to invest her with a substantial marital interest in other land. *Osborn v. Osborn*..... 890
39. ——— The petition considered, and held not to charge the husband with perpetrating a fraud on his wife with respect to the surrender of her marital interest in land belonging to him which he sold. *Id.*..... 890
40. Employment—Joint Defendants—No Separate Issues Raised—Joint Judgment. If one defendant sued jointly with others

## PLEADING AND PRACTICE—CONTINUED:

- has a different defense from the others he should, in the form of request for special findings or for special instructions or otherwise, challenge the attention of the trial court to his separate defense. *Drysdale v. Wetz*..... 422
41. Evidence—Affidavits Intended for Use on Trial—Notice to Adverse Party. Under section 350 of the civil code service of copies of affidavits intended to be used upon the trial is sufficiently made when delivered to the adverse litigant personally at his principal place of business, even though that may be outside the state. *Business Blocks Co. v. Gregory*.... 33
42. Exchange of Property—Fraud—Pleadings—Rulings on Motions Not Prejudicial. The overruling of a motion to require different causes of action to be separately stated and numbered, being a matter of discretion, is ordinarily not subject to review. *Mullarky v. Manker*..... 92
43. ——— Where a demurrer to a petition on the ground of misjoinder is based upon the claim that one of the defendants is not affected by one of the causes of action, the sustaining of a demurrer to the evidence as to that defendant prevents the overruling of the demurrer on the ground of misjoinder of parties from being material on appeal. *Id.*..... 92
44. ——— The overruling of a motion to strike matter from a petition held not to have been prejudicial. *Id.*..... 92
45. False Arrest—Damages—Petition—Necessary Allegations. Where the petition alleges that by reason of the false arrest the plaintiff's business greatly declined and was damaged in the sum of \$1,000, it is not reversible error to require the plaintiff to set out in his petition specifically and in detail how he was thus damaged. *Smith v. Hern*..... 378
46. False Arrest—Receiving Stolen Goods—Evidence of Similar Offenses. In an action to recover damages for false arrest under a charge that the plaintiff had knowingly received feloniously stolen goods, evidence is admissible to prove that the plaintiff had on other occasions knowingly received stolen goods. *Id.*..... 378
47. Foreclosure—Sale—Confirmation—Motion to Set Aside—Laches. Where the original judgment of foreclosure was erroneous but not void, and three years after the sale and confirmation defendants filed a motion to set aside the confirmation, and that they be allowed to redeem, the application was made too late to entitle them to relief. *Marsh v. Votaw*..... 747
48. Gift—Transaction with Deceased—Deposition of Incompetent Witness—Waiver. Where plaintiffs take the deposition of defendant, who is incompetent to testify to transactions with a person since deceased, the taking of defendant's deposition by plaintiffs is a waiver of objections to his testimony and the deposition may be read in evidence on behalf of the defendant. *Golder v. Golder*..... 486
49. Implied Contract—Use of Patented Invention—Jurisdiction of State Courts. An action by the owner of a patent to recover on an implied contract for use of a patented invention, with patentee's knowledge and consent, is not an action for the infringement of a patent, and the state courts have jurisdiction, notwithstanding the answer pleads the invalidity of the patent. *Ridgway v. Wetterhold*..... 217
50. Insurance—Loss—Inconsistent Findings—New Trial. The court granted a new trial of the cause because the verdict re-

## PLEADING AND PRACTICE—CONTINUED:

- turned by the jury was not supported by the evidence and because the special findings were inconsistent. Held, not error. *Tersina v. Insurance Co.*..... 87
51. Malicious Prosecution—Conviction in Police Court—Probable Cause Shown. The third count in the petition is held to state no cause of action because the conviction in the police court is conclusive of probable cause. *Smith v. Parman*..... 787
52. Malicious Prosecution—Statute of Limitations. In an action for malicious prosecution the causes of action set forth in the first and second counts of the petition held barred by the statute of limitations. *Id.*..... 787
53. Mandamus—Approval of Appeal Bond—Writ Denied. The supreme court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency, when the judge's good faith is not challenged. *Linderholm v. Walker*..... 684
54. Mining Coal—Unambiguous Contract—Interpretation for Court. Where a contract is not ambiguous, and there is no charge of fraud, accident, or mistake, the intention of the parties must be ascertained from the contract, and its construction is a matter of law for the court. *Walsh v. Fuel Co.*..... 29
55. Motion for Judgment—Pleadings—Notice. There is no statutory provision for making up issues for the trial of motions, and the filing of an answer to a motion for judgment does not required three days' notice of the time of the hearing of such motion. *Berry v. Dewey*..... 392
56. Moving Pictures—Censorship—Petition to Court for Review—Defective Allegations. In the absence of allegations or proof that the moving-picture board acted arbitrarily or dishonestly it must be presumed that it acted in good faith and its determination was an honest exercise of its best judgment. *Photo Play Corporation v. Board of Review*..... 356
57. Negligence—Findings Contrary to Evidence—New Trial. A verdict of the jury must be set aside where special findings material to its support are determined by the court to be contrary to the evidence. *Brice-Nash v. Street Railway Co.*..... 36
58. Negligence—Personal Injuries—Proper Special Questions. In an action to recover for injuries negligently inflicted it is proper to request the jury to find what the defendant's acts of negligence were. *Eastman v. Railway Co.*..... 400
59. ——— A submitted question is examined and not found to contain any pitfall or trap for the unwary juror. *Id.*..... 400
60. Negligence—Weight of Certain Evidence—Improper Instructions. A certain instruction relative to comparative weight of the evidence of one who testified he saw an engine, and that of witnesses who testified that they did not see such engine, should not have been given. *Smith v. Railway Co.*..... 150
61. New Trial—Cumulative Evidence—Judicial Discretion. The production of cumulative evidence in support of a motion for a new trial is addressed to the sound discretion of the trial court and does not require the granting of a new trial as a strict matter of right. *Biernacki v. Ratzlaff* ..... 573
62. New Trial—Rejected Evidence—Production on Motion. The provision of the civil code that in order to preserve for review a ruling excluding evidence, the evidence must be produced at the hearing of the motion for a new trial, applies in criminal as well as in civil cases. *The State v. Wellman*..... 503



## PLEADING AND PRACTICE—CONTINUED:

63. **Newly Discovered Evidence—Cumulative.** A party is not entitled to a new trial on the ground of newly discovered evidence where the new evidence is of the same kind and goes to the same point as that offered on the trial. *Sheahan v. Kansas City* ..... 252
64. **Note—Bill of Particulars—Stated No Cause of Action—Erroneous Judgment.** A bill of particulars setting out certain notes with proper allegations to show liability, except an averment of notice of dishonor or waiver thereof, states no cause of action against the indorser. *Investment Co. v. Gamble*... 791
65. ——— It was error to render judgment for the plaintiff on such bill of particulars. *Id.*..... 791
66. **Note—No Indorsement of Copy in Petition—Amendment.** Where the copy of a note attached to a petition failed to show a written indorsement and the case was tried by the parties as if plaintiff was a holder in due course plaintiff should have been allowed to amend his petition to conform to the proof. *Stevens v. Vermillion*..... 408
67. **Note—Oral Agreement Varying Indorsement—No Defense.** A claim by the indorser of notes that it was orally agreed that on certain conditions she would not be called on to pay the notes is a variance from the written instrument and constitutes no defense. *Investment Co. v. Gamble*..... 791
68. **Pleadings—Demurrer.** Parts of an answer to a petition in an action in replevin examined, and no prejudice disclosed in overruling a demurrer thereto. *Implement Co. v. Willhite*... 56
69. **Pleadings—Stipulation—Erroneous Judgment.** Where parties at the commencement of the trial filed a stipulation that certain facts were admitted and reserved the right to introduce further evidence, it was error to sustain a motion for judgment on the pleadings and stipulation. *Coburn v. Simpson* ..... 234
70. ——— In addition to claims of title by a written conveyance the answer also presented the issue of the passing of title by an oral gift, followed by possession and lasting and valuable improvements. *Id.*..... 234
71. **Personal Injuries—Findings—Contributory Negligence.** In an action against a city for injuries sustained by a pedestrian striking her foot against the end of a plank the findings of the jury did not as a matter of law convict the plaintiff of contributory negligence. *Weaver v. City of Cherryvale*..... 475
72. **Personal Injuries—Findings—Evidence.** The question of the sufficiency of the evidence, while not presented by a motion for a new trial, held to be involved in the decision on the effect of the findings. *Id.*..... 475
73. **Personal Injuries—Findings—Verdict—New Trial at Subsequent Term.** Where at a subsequent term the court granted a new trial because of certain findings, no motion therefor having been filed by either party, such ruling is reversible on appeal. *Id.*..... 475
74. **Reopening Account and Settlement—Evidence—Instructions.** The withdrawal of evidence with reference to one item of an account held not to have been erroneous. *McCue v. Hope*.... 147
75. ——— The evidence held to have warranted the submission to the jury of the controversy regarding several items of an account. *Id.*..... 147

## PLEADING AND PRACTICE—CONTINUED:

76. ——— Language in an instruction defining the character of the action held to have been in accordance with the decision of this court on a former appeal. *Id.*..... 147
77. Reopening Account and Settlement—Pleadings. The enlargement of the issues beyond those specifically presented by the pleadings held not to have been prejudicial. *Id.*..... 147
78. Report of Referee—"Decision of Court"—Judgment. The report of a referee determining the whole issue by findings of fact and conclusions of law separately stated stands as the decision of the court, and judgment may be entered thereon. *Milling Co. v. Schreiber*..... 172
79. Report of Referee—"Decision of Court"—Judgment—Statute. The word "decision" in section 306 of the civil code, providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue. *Id.*..... 172
80. Robbery—Cross-examination—Improper Impeaching Questions. In cross-examination of a witness for the purpose of impeachment it was not error to exclude previous explanation of prior contradictory statements when that explanation is not contradictory to or inconsistent with his evidence on the trial. *The State v. King*..... 155
81. Robbery—Statements of Defendant on Previous Trial—Competent. The testimony of defendant in a criminal action given on a former trial may be introduced in evidence against him. *Id.*..... 155
82. Robbery—Trial—Photograph Competent Evidence. A photograph of one charged with the commission of a crime may be introduced in evidence for the purpose of corroborating a witness who identifies the one charged. *Id.*..... 155
83. Robbery—Use of Automobile—Competent Opinion Evidence. Where two robbers sat in their automobile in front of a store while their two companions robbed the store, the evidence of one who afterwards sat in his automobile at the same place is competent to show that the place where the crime was committed could be seen from the automobile. *Id.*, 155
84. Sale—Breach of Warranty—Burden of Proof. In an action for breach of warranty in the sale of a jack, where the facts touching the alleged failure of warranty were peculiarly within the knowledge of the vendee, it was proper to impose upon the vendee the burden of showing that the jack did not measure up to the warranty. *Egan v. Murray*..... 193
85. Sale of Jack—Breach of Warranty—Petition—Prayer for Relief. Ordinarily a petition which narrates several distinct breaches of a valid contract states a cause of action with sufficient precision against the party who breached the contract, although the prayer may be for alternative relief, and a cause of action so pleaded is good against a demurrer. *Id.*..... 193
86. ——— The prayer of a petition is no part of the statement of facts, and if the cause of action is stated and proved the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part with the relief prayed for. *Id.*..... 193
87. School Warrants—Action—Pleadings—No New Cause of Action in Reply. Where the answer pleaded that school war-

## PLEADING AND PRACTICE—CONTINUED:

- rants sued upon were unlawfully issued, a reply which alleges that the district received the consideration for which the warrants were issued, and had ratified the warrants, stated no new cause of action. *Bank v. School District*..... 98
88. Settlement—Stipulation—Time of Payment—Interest. Where under a written stipulation the amount for which judgment should be rendered was stated, and the time of payment was postponed to a future period, such payment should draw interest from the time such payments were to be made. *Berry v. Dewey* ..... 392
89. Substitution of Gasoline for Coal Oil—Fire in Cook Stove—Evidence. Whether or not the plaintiff was negligent in using what he supposed to be coal oil in starting a fire in his cook stove was a question of fact properly submitted to the jury. *Harlow v. Propes*..... 424
90. ——— The substitution of gasoline for coal oil held to have been the proximate cause of the injury complained of. *Id.*, 424
91. Term of Court—Adjournment by Sheriff. A sheriff may in pursuance of an order of the court adjourn the term of the district court *sine die* without the personal presence of the judge in the court room at the time the adjournment is announced. *Mulcahy v. City of Moline*..... 531
92. Transcript from Justice of Peace—Filed in Another County—Sheriff's Sale—Open to Attack. An attempt to redeem real property from a sheriff's sale made under an execution that is void does not ratify the proceedings nor cure the defect in the jurisdiction. *Duncan v. Investment Co.*..... 725
93. Transcript from Justice of Peace—Filed with District Clerk of Another County—Void Execution. Where a transcript of a judgment of a justice of the peace is filed with the district clerk and a copy of such transcript is filed with the district clerk of another county, the district court of the latter county has no jurisdiction to issue an execution thereon, or to confirm a sheriff's sale made thereunder. *Id.*..... 725
94. Trial—Agent's Commissions—Impeachment of Witness—Requested Instructions. Where a witness has been called by all the parties to the action, cross-examination which tends to impeach the witness is within the sound judicial discretion of the trial court. *Avery v. Howell*..... 527
95. Trial—Counsel Reading from Magazine to Jury. The reading of an article from a magazine in the course of argument of counsel which was illustrative in character and condemning methods employed by a detective agent to extort a confession from a suspect was not prejudicial error. *Mansfield v. Detective Agency*. .... 687
96. Trial—Motion for Continuance—Judicial Discretion. No abuse of discretion is shown in refusing the application of a corporation defendant for a continuance in order to procure the attendance of its president, who had absented himself with knowledge that the case had been set for trial. *Garner v. Grocery Co.* ..... 5
97. Trial—Witness Admonished before Jury—No Error. While testifying as a witness one of the defendants made a voluntary statement outside of the case which called for a rebuke by the court. Held, that the incident was not likely to have prejudiced defendants, but if it did they cannot complain. *Drysdale v. Wetz*..... 680

## PLEADING AND PRACTICE—CONTINUED:

98. **Uninsulated Wires—Duty of Electric Company—Instruction.** An instruction which taken alone might seem to indicate that as a matter of law the company was bound to anticipate an accident held not to have been prejudicial because of other explicit instructions concerning the matter. *Storm v. Light Co.*, 40
99. **Uninsulated Wires—Injuries—Trial—Findings Construed.** A finding to the effect that a loose wire had been in contact with the wires of an electric light company so long that it ought to have discovered it before the occurrence of an accident was held not supported by the evidence. *Id.*..... 40
100. ——— A finding that the company's wires would not have injured any one using the streets in a way reasonably to have been foreseen, held not to mean that the throwing of a loose wire across them could not have been anticipated by the exercise of ordinary caution. *Id.*..... 40
101. **Written Contract—Contemporaneous Oral Agreement—Oral Agreement Void.** Where plaintiff sought to recover on a written contract for the payment of money, and also on a verbal contract relating to the same contract made at the same time, the contemporaneous oral agreement was properly disregarded. *Lessem v. Harris*..... 222
102. **Written Instrument—Testamentary in Character—Pleadings—Title—Gifts.** In addition to claims of title by a written conveyance the answer also presented the issue of the passing of title by an oral gift, followed by possession and lasting and valuable improvements. *Coburn v. Simpson*..... 234

## PRACTICE, DISTRICT COURT—See PLEADING AND PRACTICE.

## PRACTICE, JUSTICE OF THE PEACE.

1. **Criminal Prosecutions—Control of County Attorney—May Dismiss Action.** While the county attorney is not required to take part in a preliminary examination in a felony case, unless requested to do so by the magistrate, if he does appear he is entitled to have full charge of the prosecution. *Foley v. Ham* ..... 66
2. ——— Where a justice of the peace sitting as an examining magistrate refuses to dismiss a criminal prosecution on the motion of the county attorney, the district court by an order in the nature of a writ of prohibition may compel such action. *Id.* ..... 66
3. **Criminal Prosecution—Refusal of Justice to Dismiss Action—Writ of Prohibition.** Where a county attorney asks the dismissal of a criminal case pending before a justice of the peace, and his request is denied, no further challenge of the right of the justice to proceed therein is necessary to give a basis for asking relief by prohibition. *Id.*..... 66
4. **Criminal Prosecutions—Unwarranted Prosecutions—Injunction.** Injunction against the maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened. *Id.* ..... 66
5. **Note—Bill of Particulars—Stated No Cause of Action—Erroneous Judgment.** A bill of particulars setting out certain notes with proper allegations to show liability, except an averment of notice of dishonor or waiver thereof, states no cause of action against the indorser. *Investment Co. v. Gamble*.... 791
6. ——— It was error to render judgment for the plaintiff on such bill of particulars. *Id.*..... 791

## PRACTICE, PROBATE COURT:

1. **Administrator—Order of Probate Court—Appeal by Administrator—Appeal Bond Required.** An administrator who appeals to the district court from an order of the probate court which charges him with interest on certain funds, deducts the interest charges from an allowance of compensation previously made, and directs distribution of the estate, is required to give an appeal bond. *Elliott v. Baird*..... 317
2. **Claim against Estate—Proof—Demand Increased by Amendment.** Where parties are required to itemize their claim against an estate, no prejudice resulted by including in their amended demand a list of items in excess of the amount of their original demand. *Dubbs v. Haworth*..... 603
3. **Claim against Estate—Statute of Limitations.** Where two persons jointly perform services for another, which services were to be paid for by the recipient thereof "after she was through with her property," a demand against the latter's estate after her death, if timely made, is not affected by the statute of limitations. *Id.*..... 603
4. **Contract of Employment—Consistent Findings.** In an action against an estate for services performed for decedent there was no inconsistency in the findings relative to the time when payment was to be made for such services. *Id.*..... 603
5. **Contract of Employment—Proof of Claim against Estate—Verification.** Where pursuant to a single contract two persons jointly perform services for another since deceased, the affidavit of one of the joint performers is a sufficient verification of the proof of claim against the estate of the employer. *Id.*..... 603
6. Where the administrator's objection to such affidavit was too obscure to apprise the court of the specific nature of any defect therein, the defect, if any, will be deemed waived. *Id.*..... 603
7. **Indebtedness of Heir to Ancestor—Equitable Distribution of Estate—Limitation of Actions.** An indebtedness owing by an heir to his ancestor constitutes an equitable lien in favor of the estate upon such heirs distributive share of the real property belonging to the estate superior to the lien of any judgment against such heir existing at the time of the death of the ancestor. *Wilson v. Channell*..... 793
8. ——— In determining the equities between an heir who is indebted to an ancestor and the ancestor's estate the statute of limitations has no application. *Id.*..... 793
9. **Insane Persons—Guardian May be Appointed Without Notice.** A probate court may without notice appoint a successor to a guardian for a lunatic who has been duly adjudged to be a person of unsound mind, confined in a state hospital, and discharged therefrom as improved. *Ekblad v. Linderholm*..... 3

PRELIMINARY EXAMINATION—See CRIMINAL LAW, 13.

PRESUMPTION—See FRAUD, 21; ILLEGITIMATE CHILDREN, 1, 2.

PRINCIPAL AND AGENT—See AGENCY.

## PROCEEDINGS IN AID OF EXECUTION:

1. **Proceedings in Aid of Execution—Will—"Spendthrift Trust."** To create a spendthrift trust a will need not expressly declare that the interest of the *cestui que trust* shall be beyond the reach of his creditors. It is sufficient if the intention can be clearly ascertained from the whole will. *Everitt v. Haskins* ..... 546

PROCEEDINGS IN AID OF EXECUTION—CONTINUED:

2. ——— In the present case the will created a spendthrift trust and the trust property cannot be reached by creditors of the *cestui que trust*. *Id.*..... 546

PROCESS:

1. Action to Compel Reconveyance—Fraud—Action Transitory. An action to compel the defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud, is transitory and not local, and may be brought in any county where personal service can be had upon him. *Zane v. Vawter*..... 887
2. Railway Company—In Hands of Receiver—Service of Process. Where a railway company is in the hands of a receiver who has taken possession and control of all assets and property of the corporation, service of summons in an action against the railway corporation on a station agent in the employ of the receiver is not good service on the corporation. *Chilleti v. Railway Co.*..... 297

PROHIBITION:

1. Refusal to Dismiss Prosecution—Request of County Attorney. Where a justice of the peace as examining magistrate refuses to dismiss a criminal prosecution on motion of the county attorney, the district court by an order in the nature of a writ of prohibition may compel such dismissal. *Foley v. Ham*..... 66
2. ——— Where a county attorney's request for dismissal of a criminal case pending before a justice of the peace is denied, no further challenge of the justice's right to proceed therein is necessary as a basis for relief by prohibition. *Id.*..... 66

PROOF OF CLAIM—See EXECUTORS AND ADMINISTRATORS, 4, 5.

PROXIMATE CAUSE—See NEGLIGENCE, 7, 30, 36, 37, 47.

PUBLIC LANDS:

1. Public Lands—Congressional Grant—Railroad Right of Way—Vested Title. Under the acts of congress of 1862 and 1864 the Union Pacific Railroad Company became the owner in fee of a right of way 200 feet on either side from the center of the track, which right is superior to claims subsequently initiated and is not defeated by adverse possession. *Railroad Co. v. Davenport*..... 513

PUBLIC UTILITIES—See PUBLIC UTILITIES COMMISSION.

PUBLIC UTILITIES COMMISSION:

1. Dismantling Telephone Line—Another Efficient Line Established. The dismantling of a direct telephone line between two places does not constitute an objectionable change in service, where another equally efficient line, though not a direct one, between the two points is established. *The State, ex rel., v. Telephone Co.*..... 318
2. Gas—Street Lighting—Power to Regulate. Power to regulate lighting equipment for city streets where service to be performed is principally within the city is by the public utilities act reserved to the city and is not vested in the public utilities commission. *Street Lighting Co. v. City of Wichita*..... 4
3. Gratuitous Service—Discriminatory Practice. The gratuitous allowance by one telephone company of the use by another company of a line owned by it, constitutes a discriminating

## PUBLIC UTILITIES COMMISSION—CONTINUED:

- practice forbidden by the statute, and therefore is not one which the utilities commission can require to be continued. *The State, ex rel., v. Telephone Co.*..... 318
4. Interurban Railway—Local Service in City—Control of Utilities Commission. Where an interurban railway operating through numerous cities extended its line into a city for local service, the power to require local cars to run to a given point at specified times is by the statute vested in the utilities commission, and cannot be controlled by city ordinance. *In re Wright* ..... 329
5. Natural Gas Companies—Jurisdiction to Change Rates—Receivers. The state courts have no jurisdiction through receivers to regulate rates of public service corporations, and neither the courts nor receivers of such corporations may change legal rates without consent of the public utilities commission. *The State v. Gas Co.*..... 712
6. ——— When the legal rates charged by the receiver of a public service corporation have been legally enjoined, the receiver may put into effect rates to be charged until the commission establishes a new rate. *Id.*..... 712
7. Utilities Commission—Telephone Line Discontinued—Restoration Ordered—Mandamus Denied. Where a telephone line is discontinued without consent of the utilities commission and facts are shown would have compelled the granting of such consent had it been asked, obedience of an order of the utilities commission directing a restoration will not be compelled by mandamus. *The State, ex rel., v. Telephone Co.*, 318
8. Utilities Commission—Order Enforceable by Mandamus. This court has jurisdiction to enforce by mandamus an order of the utilities commission, notwithstanding the pendency in the district court of an action to enjoin its enforcement. *Id.*, 318

## PUNITIVE DAMAGES—See DAMAGES 24-27.

## Q.

## QUIETING TITLE:

1. "Bond to Quiet Title"—Demurrer to Evidence—Sustained. In an action upon a bond given by defendant to plaintiff "to quiet title" to certain described lands, the evidence supported the findings that the conditions of the bond had been performed by defendant. *Snodgrass v. Snodgrass*..... 281
2. "Bond to Quiet Title"—Evidence of Value of Certain Land—Properly Rejected. In an action on a bond to quiet title where the testimony showed that the plaintiff was not entitled to forty-six acres of the land described it was not error to reject evidence of its value or evidence of the value of the land deeded in consideration of the bond sued on. *Id.*..... 281
3. "Bond to Quiet Title"—Misdescription of Land—Reformation. Where there was a mistake in the description of land as given in a "bond to quiet title" and no reformation was asked, it was not prejudicial error for the trial court to treat the bond as reformed to correspond with the facts proven. *Id.*..... 281
4. "Bond to Quiet Title"—Tender of Quitclaim Deed—Sufficient Performance. In an action upon a bond given "to quiet title" to certain described lands, a tender of a quitclaim deed which quieted the title in plaintiff to all the land he could rightly claim was a sufficient performance of the conditions of the bond. *Id.*..... 281

QUIETING TITLE—CONTINUED:

5. Will — Perpetuities — Void Provisions — Descent of Estate. Where a will fails because it offends the rule against perpetuities the property thus ineffectually disposed of vests at once in the heirs at law of the deceased. *Lasnier v. Martin*.. 551
6. Wills—Rule against Perpetuities. The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being. *Id.*..... 551
7. ——— Provisions of a will which direct that no disposition of certain property shall be made "within twenty-one years after the death of my beloved wife" are void under the rule against perpetuities. *Id.*..... 551

QUO WARRANTO:

1. Boundary of City—City Ordinance—Scope of Title. That portion of a city ordinance which undertakes to exclude territory from the corporate limits is held to be ineffective because the only purpose expressed in the title to the ordinance is "extending the limits of the city." *The State, ex rel., v. City of Hutchinson* ..... 325
2. Boundary of City—Petition in Quo Warranto Construed. A petition in quo warranto against a city charging it with unlawfully refusing to exercise jurisdiction of a tract of land within the corporate limits is construed to allege that such tract had not been excluded from the city. *Id.*..... 325
3. Drainage District Supervisors—Tenure of Office—Constitutional Law. The provision in chapter 168 of the Laws of 1911 fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the constitution forbidding the legislature to create any office the tenure of which is longer than four years. *The State, ex rel., v. Drainage District*..... 575
4. Natural Gas Companies—Action Dismissed—Appeal too Late. When an action is dismissed as to certain defendants, all orders which were made prior to the order of dismissal, and of which complaint is made by those defendants, must be appealed from within six months after the order or dismissal is made. *The State v. Gas Co.*..... 712
5. Natural Gas Companies—Jurisdiction to Change Rates—Receivers. The state courts have no jurisdiction through receivers to regulate rates of public service corporations, and neither the courts nor receivers of such corporations may change legal rates without consent of the utilities commission. *Id.* ..... 712
6. ——— When the legal rates charged by the receiver of a public service corporation have been legally enjoined the receiver may put into effect rates to be charged until the commission establishes a new rate. *Id.*..... 712
7. Quo Warranto—Proper Proceeding to Determine City Boundaries. The state may maintain quo warranto against a city for the purpose of determining its true boundary, where its fault consists in confining its territorial jurisdiction within too narrow limits as well as where it undertakes to extend them too far. *The State, ex rel., v. City of Hutchinson*..... 325



## R.

## RAILROADS:

1. Automobile Crossing Railroad—Obstruction to View—Duty of Driver — Contributory Negligence. Where an automobile driver is about to cross a railroad track at a place where his view is obstructed, it is his duty, before driving upon the track, to stop, look and listen, or otherwise assure himself of the fact that he can cross in safety. *Williams v. Electric Railroad Co.* ..... 268
2. ——— An automobile driver who attempted to cross a railway track where his view was obstructed, without stopping and ascertaining whether he could cross in safety, was guilty of contributory negligence barring recovery for damages from a collision. *Id.* ..... 268
3. Automobile Crossing Railroad—Trolley Car Violating Speed Ordinance—Negligence. A breach of a speed ordinance of a city by an interurban trolley car is negligence *per se*; but to subject the owner of the trolley car to liability for the violation of the city ordinance in a damage suit by a private litigant it must appear that the disobedience of the ordinance caused or aggravated the damages. *Id.* ..... 268
4. Automobile—Negligence of Driver—No Imputed Negligence to Minor Son. The negligence of a father in driving an automobile across a railroad track without stopping, looking or listening, cannot be imputed to his ten-year-old son who is riding with him. *Burzio v. Railway Co.* ..... 287
5. Building Tunnel—Engineer's Estimate—Payment—Accord and Satisfaction. Under a contract for building a tunnel where the railroad engineer made his final estimates of work done, the acceptance by the contractor of a payment on such estimates did not bind him to an accord and satisfaction of his entire claim. *Contracting Co. v. Railway Co.* ..... 799
6. Car Repairer—Not Engaged in Interstate Commerce. A car repairer was not engaged in interstate commerce while working on a car which was being repaired in railroad shops and not in use in any kind of transportation. *Defenbaugh v. Railroad Co.* ..... 569
7. Condemnation Proceedings — Damages — Findings Not Conflicting. In condemnation proceedings a special finding that there was no evidence of the depreciation of each part of a farm lying on either side of the right of way does not conflict with another finding of the damages to the land as a whole. *Calkins v. Railroad Co.* ..... 835
8. Condemnation Proceedings—Interest on Damages Sustained. A proceeding to condemn private property for public use does not involve a tort, and an owner whose land is so appropriated is entitled to interest on the damages sustained by him from the time of the appropriation. *Id.* ..... 835
9. Death of Fireman—Falling from Moving Train—Assumption of Risk. Under the federal employer's liability act where an experienced fireman seeing his train in motion climbed on top of a car, and while going forward over the car tops fell and was killed, he assumed the risk. *Briggs v. Railroad Co.* ..... 441
10. Defective Engine—Fire Loss — Evidence — Train Records—Weight of Such Evidence. Although the train sheets and records of a railway company show that no engine was operated at or near the place where a fire occurred, this court cannot weigh such evidence against evidence of other witnesses

RAILROADS—CONTINUED:

- who testified that they saw an engine operating there at that time. *Smith v. Railway Co.*..... 150
11. Eminent Domain—Railroad Right of Way—Elements of Damages. Where a part of a tract of land is taken for a railroad right of way, injury to the remaining land resulting from the digging of borrow pits, as well as danger of seeds being carried from noxious weeds growing on the right of way, are proper elements of damages to be considered by the jury. *Schaake v. Railway Co.*..... 470
12. Eminent Domain—Railroad Right of Way—Interest on Damages. In condemnation proceedings the allowance of interest from the date of the appropriation of the land was not erroneous. *Craig v. Railroad Co.*..... 838
13. Eminent Domain—Railroad Right of Way—Measure of Damages to Whole Farm. In determining the damages to a farm resulting from a railroad right of way, no reversible error was committed in sustaining objections on cross-examination of a witness as to the value of specific tracts of the farm. *Id.*.... 838
14. Eminent Domain—Railroad Right of Way—Special Questions Refused—No Error. In condemnation proceedings no error was committed in the refusal to require the jury to answer questions as to how much depreciation in the value of each of several tracts forming a part of the farm was caused by the appropriation of the right of way. *Id.*..... 838
15. ——— In such a case no error is committed in the refusal to require the jury to enumerate the considerations that tended to make the farm less valuable by reason of the location of the railroad. *Id.*..... 838
16. Injuries—Railroad Crossing—Findings—Instructions. Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms, state facts and not conclusions of law. *Burzio v. Railway Co.*..... 287
17. Interstate Bill of Lading—Acceptance by Consignee—Implied Contract to Pay Freight. Where an interstate bill of lading authorizes the consignee to pay the freight charges, an implied contract by the consignee to pay the full established freight charges arises from his acceptance of the delivery of the goods under the bill. *Railway Co. v. Wagner.*..... 817
18. ——— In such case where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against him for the unpaid balance of the legal charges. *Id.*..... 817
19. Interstate Commerce—Classification of Commodities—Binding on Court. In an action to recover the amount of undercharges for freight shipments, computed according to schedule in force governing the subject, it is error for the court to receive and consider proof that the commodities shipped were not classified in the schedule according to correct principles. *Railway Co. v. Young.*..... 875
20. Interstate Commerce—Established Rates—Binding on Shipper and Carrier. A schedule of freight rates duly filed and published by a railroad company and not disapproved by the interstate commerce commission has the force of a statute, binding alike on shipper and carrier. *Id.*..... 875
21. Negligence—Allegations.—Proof. Two of the three alleged grounds of negligence being based on matters not required of

## RAILROADS—CONTINUED:

- the defendant railroad and the other having failed of proof, the plaintiff cannot prevail. *George v. Railway Co.*..... 774
22. Negligence—Car Equipment Required for Protection of Brakemen. A train is required to have eighty-five percent of its cars equipped with air brakes, so that it can be operated by the engineer, thus rendering it necessary to have certain of its cars connected by air hose. *Id.*..... 774
23. ——— There is no requirement that the cars be so equipped that such air hose or safety chains can be disconnected without going between the cars. *Id.*..... 774
24. Negligence—No Buffer Appliances on Cars—No Liability Established. Where a railroad is not required to equip its cars with buffer appliances for the protection of brakemen, findings that the negligence consisted in the failure to equip with buffer and buffer appliances do not establish liability. *Id.*..... 774
25. Negligence—Personal Injuries—Proper Special Questions. In an action to recover for injuries negligently inflicted it is proper to request the jury to find what the defendant's acts of negligence were. *Eastman v. Railway Co.*..... 400
26. ——— A submitted question examined and not found to contain any pitfall or trap for the unwary juror. *Id.*..... 400
27. Negligence—Railroad Crossing—Obstruction to View. Liability of a railroad company for injuries sustained in a collision between an automobile and a railroad car may be founded on negligence in allowing weeds, grass and brush to grow so as to obstruct the vision of those approaching the railroad crossing. *Burzio v. Railway Co.*..... 287
28. Negligence—Street-car Track—Buggy Overturned—Death—Findings. In an action for damages for the death of a driver of a buggy, occasioned by a street-car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.*..... 214
29. Negligence—Two Acts of Negligence—Findings Sufficient. Where a jury by special questions were required to specify what particular act or acts of negligence caused the fire, answers specifying "careless handling of the engine or defective condition of the smoke stack of the engine" were, under the evidence, sufficient. *Smith v. Railway Co.*..... 150
30. Negligence—Verdict—Findings—Interpretation. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Railway Co.*..... 287
31. Obstructing Access to City Lots—Inconsistent Findings. In an action for damages for obstructing access to city property, one finding that the obstruction complained of rendered the street impassable, and another finding that the street was passable, were fatally inconsistent and contradictory. *Griffith v. Railway Co.*..... 23
32. Obstructing Access to City Lots—Joint Liability of Defendants. Under the circumstances shown, the finding that one of defendants rearranged certain railroad tracks, thereby obstructing travel in the street, did not relieve the other defendant from responsibility therefor. *Id.*..... 23

## RAILROADS—CONTINUED:

33. **Obstructing Street—Cause of Damages as Alleged Not Proven.** It appearing that the cement wall complained of as a barricade did not have the effect to increase the obstruction to travel, it is held that the plaintiff cannot recover on account of the erection of such wall. *Id.*..... 23
34. ——— From the location of different avenues of approach to his property shown by the record, the plaintiff is not shown to have been damaged by the rearrangement of the railroad tracks complained of. *Id.*..... 23
35. **Personal Injuries—Negligence Alleged Not Proven.** The plaintiff alleged that the defendant's roadmaster directed him to board a car which it had negligently left in an unsafe condition. The jury found the negligence to consist of the direction of the roadmaster to board the car. Held, that as the negligence charged was not proved the plaintiff cannot recover. *Eastman v. Railroad Co.*..... 400
36. **Public Lands—Congressional Grant—Railroad Right of Way—Vested Title.** Under the acts of congress of 1862 and 1864 the Union Pacific Railroad Company became the owner in fee of a right of way 200 feet on either side from the center of the track, which right is superior to claims subsequently initiated, and is not defeated by adverse possession. *Railroad Co. v. Davenport* ..... 513
37. **Railway Company—In Hands of Receiver—Service of Process.** Where a railway company is in the hands of a receiver who has taken possession and control of all assets and property of the corporation, service of summons in an action against the railway corporation on a station agent in the employ of the receiver is not good service on the corporation. *Chilleti v. Railway Co.* ..... 297
38. **Schedule of Rates—Presumption that Schedule was Duly Published.** Where it is admitted that a schedule of rates has been duly filed with, and approved by, the interstate commerce commission the presumption, in the absence of showing to the contrary, is that the rates were duly published. *Railway Co. v. Wagner* ..... 817
39. **Shipment of Cattle—Loss—Notice to Carrier.** The contract of shipment required notice of loss or injury during transportation or at loading or unloading places on the carrier's road. Held, the contract was concluded with delivery, and notice of loss occurring after delivery was not necessary. *Ott v. Railway Co.* ..... 254
40. **Shipper of Stock—Dangerous Position Voluntarily Taken—Railroad Not Liable.** Where a shipper of stock riding on a shipper's pass voluntarily placed himself in a position of obvious danger on the side of a moving freight car, and was not engaged in looking after the stock in his charge, the railroad company is not liable in an action to recover for his death. *Shore v. Railway Co.* ..... 542
41. **Shipping Cattle—Delay in Transportation—Damages—Instruction.** In an action for damages for delay in transportation of cattle, where the carrier knew of conditions likely to cause delay, and the carrier accepted the cattle for shipment without informing the shipper of such conditions, the carrier was liable for damages from the delay in the transportation. *Ott v. Railway Co.*..... 254
42. **Unprotected Railroad Repair Shops—Contributory Negligence—Assumption of Risk.** Where a car repairer was injured by

## RAILROADS—CONTINUED:

- being blown from the top of a car which he was repairing in railroad shops not provided with sheds as required by statute, he was neither guilty of contributory negligence, nor did he assume the risk. *Defenbaugh v. Railroad Co.*..... 569
43. Unprotected Railroad Repair Shops—Injury to Employee. A railroad is liable for injuries sustained by a car repairer who was blown from a car which he was repairing in regular shops on tracks exclusively used for repair work, but which shops were not protected by sheds as required by statute. *Id.*, 569

## RECEIVERS:

1. Railway Company—In Hands of Receiver—Service of Process. Where a railway company is in the hands of a receiver who has taken possession and control of all assets and property of the corporation, service of summons in an action against the railway corporation on a station agent in the employ of the receiver is not good service on the corporation. *Chilleti v. Railway Co.*..... 297

## REDEMPTION:

1. Foreclosure Sale—Confirmation Set Aside—Redemption Allowed. In a suit by the holder of a junior judgment to set aside the confirmation of a foreclosure sale and permit him to redeem from the prior judgment, held, on the facts stated in the opinion it was error to deny the relief prayed for. *Norris v. Evans*..... 583
2. Foreclosure—Error in Judgment—Error Corrected on Appeal. Where a judgment of foreclosure was erroneous but not void and the sale was confirmed the defendants were bound by the judgment and they could take advantage of the error only by appeal. *Marsh v. Votaw*..... 747
3. Foreclosure — Sale — Confirmation — Motion to Set Aside — Laches. Where the original judgment of foreclosure was erroneous but not void, and three years after the sale and confirmation defendants filed a motion to set aside the confirmation, and that they be allowed to redeem, the application was made too late to entitle them to relief. *Id.*..... 747
4. Tax Sale—Defective Notice of Amount to Redeem—Voidable Tax Deed. If in a final redemption notice to redeem from tax sale the sum stated as necessary to redeem be substantially greater than the amount properly chargeable under the statutes a tax deed based thereon is voidable. *Jones v. Harper* 539

## REFERENCE:

1. Report of Referee—"Decision of Court"—Judgment. The report of a referee determining the whole issue by findings of fact and conclusions of law separately stated, stands as the decision of the court, and judgment may be entered thereon. *Milling Co v. Schreiber* ..... 172
2. Report of Referee—"Decision of Court"—Judgment—Statute. The word "decision" in section 306 of the civil code providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue. *Id.* ..... 172
3. Report of Referee — Findings Confirmed — Findings of Fact Conclusive. Where a defendant files a motion asking the court to approve and confirm the findings of fact made by a referee, and the court confirms and approves both the find-

## REFERENCE—CONTINUED:

- ings of fact and conclusions of law, the defendant cannot question the correctness of the findings of fact. *Bank v. School District*..... 98
4. Report of Referee—Motion—Appeal. The defendant having filed a motion within three days after the decision of the referee, which motion was overruled less than six months before the appeal was taken, is entitled to a review of the rulings mentioned in that motion. *Contracting Co. v. Railway Co.*, 799
5. Report of Referee—New Trial Denied—No Appeal—Judgment. Where judgment was rendered upon the findings of fact and conclusions of law in a referee's report, and grounds for a new trial were not presented in time, and no appeal was taken from an order denying a new trial, the judgment will be affirmed. *Bank v. Bank*..... 412
6. School Warrants—Assignment—Rights of Assignee. By the assignment of a school warrant the assignee becomes the owner of whatever claim the original holder had against the district for indebtedness evidenced by the warrant. *Bank v. School District* ..... 98

## RELEASES:

1. Compensation Act—Release—Mutual Mistake. The paper relied on as a release appears to have been signed when the parties were mutually mistaken as to the extent of plaintiff's injuries, and the sum therein named being manifestly inadequate, such instrument is not binding. *Smith v. Kansas City* ..... 518
2. Compensation Act—Release Set Aside—Sufficiency of Evidence. Under the compensation act an action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation. *Vogler v. Bowersock*..... 456
3. Compensation Act—Settlement—Written Release—Inadequate Compensation. A voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter, in the absence of fraud or mistake, is valid and binding. *Dotson v. Manufacturing Co.*..... 248
4. ——— A voluntary release and satisfaction of an injured workman's claim under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer. *Id.*..... 248
5. Compensation Act—Validity of Release—Trial by Jury. In an action under the compensation act to enforce compensation, where the validity of a release or other discharge of liability is involved, either party may, when the case is called for trial, demand a trial of that issue by a jury. *Vogler v. Bowersock* ..... 456

REMAINDERMEN—See TITLE AND OWNERSHIP, 17, 18; WILLS, 4-6.

## REPLEVIN:

1. Bankruptcy—Discharge as Affecting Chattel Mortgaged Property. A discharge in bankruptcy releases a bankrupt from all his debts which are provable in bankruptcy, except such as are exempted by the bankruptcy act. *Bank v. Hoffman*..... 465
2. ——— Where a debt secured by chattel mortgage was presented and allowed against the bankrupt's estate, and the mortgaged property not exempt was sold to satisfy the debt, the

**REPLEVIN—CONTINUED:**

- discharge of the bankrupt released all the unsold mortgaged property which was exempt from the lien of the chattel mortgage. *Id.*..... 465
3. Chattel Mortgage—Mortgagee “Deeming Itself Insecure.” In a replevin action under a chattel mortgage proof of a feeling of insecurity was sufficient to support the plaintiff’s allegation that it “deemed itself insecure”—the reasonableness of such feeling being immaterial. *Bank v. Staab*..... 369
4. Chattel Mortgage—Pleadings—Instruction Outside the Issues. In a replevin action to recover wheat under a chattel mortgage an instruction covering fraud and mutual mistake, not pleaded, was improper. *Id.*..... 369
5. Chattel Mortgage Sale—Right of Possession. Where possession of personal property is demanded by a mortgagee in an action in replevin, it is immaterial whether the right of possession is claimed by the mortgagee under his chattel mortgage or under his purchase of the property at a sale pursuant to the conditions of the chattel mortgage. *Implement Co. v. Wilhite* ..... 56
6. Chattel Mortgage—Value of Property—Evidence—Replevin Affidavit. In a replevin action the replevin affidavit made by the plaintiff was properly admitted on the question of value of the property involved. *Bank v. Staab*..... 369
7. Pleadings—Demurrer. Parts of an answer to a petition in an action in replevin examined and no prejudice disclosed in overruling a demurrer thereto. *Implement Co. v. Wilhite*..... 56
8. Replevin of Taxicab—Maintaining Liquor Nuisance—Officers Entitled to Possession. Where a driver of a taxicab was arrested on the charge of maintaining a liquor nuisance in his taxicab on the public streets, and possession of the taxicab was taken by the police, the taxicab was rightfully in possession of the police and not subject to replevin by the owner. *Allison v. Hern*..... 48

**RESCISSION**—See **CONTRACTS**, 75; **SALES**, 7, 13, 14.

**RES JUDICATA:**

1. Divorce—Decree—Property Rights Determined—Res Judicata. A final judgment in an action granting a divorce settles all property rights of the parties and is a bar to an action afterward brought by either party to determine the question of alimony, or any property rights which might have been settled by the judgment. *Heivly v. Miller*..... 313
2. Ouster—Clerk of City Court—Former Prosecution—Matters Res Judicata. A former prosecution for ouster is not a bar to a prosecution for unlawful acts which occurred after the petition in such former action was filed, which were not included therein, and which were not passed on in that action. *The State, ex rel., v. Fishback*..... 178

**REVIVOR:**

1. Compensation Act—Judgment—Death of Employee—Revivor of Judgment. A lump sum judgment in favor of a workman under the workmen’s compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of the administrator. *Monson v. Battelle* ..... 208

## REWARDS:

1. **Reward — Apprehending Criminal — Nonpay Deputy Sheriff May Earn Reward.** The evidence was sufficient to prove a contract to pay a reward for discovering, locating and apprehending a criminal. *Smith v. Fenner*..... 830
2. ——— The right of a public officer to claim a reward for doing his duty discussed. *Id.*..... 830
3. ——— A nonpay deputy sheriff, who was under no official duty to discover and apprehend a thief, is not barred by any rule of public policy from claiming a reward offered for the capture of a thief. *Id.*..... 830

RIGHT OF WAY—See RAILROADS, 7, 8, 11-15, 36.

ROBBERY—See CRIMINAL LAW, 25-28.

## S.

## SALES:

1. **Chattel Mortgage—Conditional Sale by Mortgagee—Sale Invalid—Conversion.** Where the mortgagee takes charge of chattel mortgaged property and makes a conditional sale of the property such sale is invalid and amounts to conversion by the mortgagee, and he is liable for the fair and reasonable value of the property at the time of such conversion. *Bank v. Wherry* ..... 224
2. **Farm Tractor—Agency of Salesman Established.** The evidence was held sufficient to prove that the vendor of a farm tractor was the plaintiff's agent and that the agent received from the purchaser the price of the machine. *Downes v. Rogers* ..... 797
3. **Mortgage Foreclosure—Sale—Confirmation—Sheriff's Deed—Attack—Homestead.** Where no appeal has been taken from a decree of confirmation of a sheriff's sale, mere irregularities of the sheriff's sale afford no basis for an attack upon the sheriff's deed issued in pursuance of such confirmation. *Catlin v. Deering & Co.*..... 256
4. ——— Nor can such deed be attacked on the ground that the land sold was occupied as a homestead, and therefore exempt from sale on a general execution. *Id.*..... 256
5. **Mortgage Foreclosure—Sheriff's Sale—Valid Order of Sale—Void Execution.** A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final, the title of the purchaser is not open to attack on the ground of the invalidity of the execution. *Id.*..... 256
6. **Sale—Breach of Warranty—Burden of Proof.** In an action for breach of warranty in the sale of a jack, where the facts touching the alleged failure of warranty were peculiarly within the knowledge of the vendee, it was proper to impose upon the vendee the burden of showing that the jack did not measure up to the warranty. *Eagan v. Murray*..... 193
7. **Sale—New Contract—Effect of Conditional Sale—No Renewal of Chattel Mortgage.** After a sale and rescission of a contract of purchase of a machine a new contract of conditional sale of the same machine entered into did not reanimate a chattel mortgage covering the machine which was extinguished by the former rescission. *Implement Co. v. Willhite*..... 56
8. **Sale of Jack—Breach of Warranty—Petition—Prayer for Relief.** Ordinarily a petition which narrates several distinct



## SALES—CONTINUED:

- breaches of a valid contract states a cause of action with sufficient precision against the party who breached the contract, although the prayer may be for alternative relief, and a cause of action so pleaded is good against a demurrer. *Egan v. Murray* ..... 193
9. ——— The prayer of a petition is no part of the statement of facts, and if the cause of action is stated and proved, the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part with the relief prayed for. *Id.* ..... 193
10. Sale of Land—Interest on Payments—Abstract of Title. Under the evidence and terms of the contract the vendor of land was entitled to interest on deferred payments from the date of the contract and when the abstract of title was approved. *Gillidett v. Hayden* ..... 616
11. Sale of Mechanical Milker—Damages—Findings. In an action for the purchase price of a milk separator and a mechanical milker, the findings of damages in favor of defendant from defects in the articles were not inconsistent nor unsupported by evidence. *Cream Separator Co. v. Abbott*..... 265
12. Sale of Plow—Proposition by Letter—No Acceptance—No Contract. A plow company made by letter a proposition to a local dealer whereby the dealer was to assume the responsibility for the completion of a sale of a plow. The dealer never accepted the proposition, and he is not liable for the price. *Plow Works v. Thorne*..... 849
13. Sale of Threshing Machine—Note and Mortgage—Breach of Warranty—Rescission. Where a machine is sold with warranty, and notes and chattel mortgage are given, and the machine fails to fill the warranty, the purchaser may rescind the contract and thereby effect the extinguishment of the chattel mortgage. *Implement Co. v. Willhite*..... 56
14. ——— The facts relating to a return of a threshing machine, which has proved altogether worthless for the purpose for which it was bought, examined, and held that there was a substantial compliance with the contract provisions as to the place to which the machine was to be returned. *Id.* ..... 56

## SCHOOLS AND SCHOOL DISTRICTS:

1. Bonds—Election—Repeal of Statute. Section 9081 of the General Statutes of 1915, relating to elections to vote on school bonds, was repealed by chapter 268 of the Laws of 1917, relating to the issuance of bonds by boards of education in cities of the first class. *Board of Education v. Clapp*..... 362
2. City School District—Annexing Adjacent Territory—Notice. The proceedings of a city school district in annexing adjacent territory under section 9129 of the General Statutes of 1911 were in conformity to the statute and valid. *School District v. Board of Education*..... 784
3. ——— In annexing adjacent territory to a city school district the validity of the proceedings was not affected by the fact that the school district from which the territory was detached had no notice of the application nor of the resolution annexing such territory. *Id.*..... 784
4. Condemnation Proceedings—Award of Damages—Appeal Bond. Where landowners attempted to appeal from the award of damages in condemnation proceedings and the ap-

**SALES—CONTINUED:**

- peal bond, though insufficient, was not void, it was error for the court to refuse the tender of a sufficient bond. *Wood v. School District*. . . . . 78
5. **Island Lands—Findings—New Trial Granted—No Error.** Where numerous findings were made by a jury, and upon the whole record it appears that a new trial was ordered because the trial judge disagreed with the jury on the facts, the order granting a new trial is not reviewable. *Warner v. Snook*. . . . . 814
6. ——— Although the trial court did not set aside the findings of the jury, yet unless it appears from the record that the court approved such findings, this court on appeal from an order granting a new trial will not order judgment on such findings. *Id.*. . . . . 814
7. **Mandamus—To Compel Employment of Teacher—Writ Denied.** A writ of mandamus will not issue to compel the board of education of a city of the second class to employ an additional teacher in any particular school in the city. *Miles v. Board of Education*. . . . . 137
8. **School Warrants—Action—Pleadings—No New Cause of Action in Reply.** Where the answer pleaded that school warrants sued upon were unlawfully issued, a reply which alleged that the district received the consideration for which the warrants were issued, and had ratified the warrants, stated no new cause of action. *Bank v. School District*. . . . . 98
9. **School Warrants—Amount of Judgment.** In an action on a school warrant which has been issued for a sum in excess of the amount due the creditor, but which is otherwise legally issued, the court may properly give judgment for the amount actually due on the indebtedness evidenced by the warrant. *Id.*. . . . . 98
10. **School Warrants—Assignment—Rights of Assignee.** By the assignment of a school warrant the assignee becomes the owner of whatever claim the original holder had against the district for indebtedness evidenced by the warrant. *Id.*. . . . . 98
11. **School Warrants—Drawn on Empty Treasury—Floating Debt.** School warrants issued when there are no funds in the treasury with which to pay them are not illegal nor void, but when presented they are to be marked "not paid for want of funds" and they become a floating debt of the district. *Id.*. . . . . 98

**SHERIFFS AND CONSTABLES:**

1. **Forcible and Malicious Levy—Action for Damages—Instructions.** In an action against a constable for malicious levy, instructions following claims set forth in pleadings, etc., where none were requested by defendant, held to sufficiently cover the issues. *Townsend v. Seefeld*. . . . . 302
2. **Forcible and Malicious Levy—Damages.** In an action against a constable for a malicious levy, allowance of actual damages held properly based on physical and mental suffering and not alone on nervous shock. *Id.*. . . . . 302
3. **Malicious and Oppressive Levy—Punitive Damages.** Findings following plaintiff's evidence held to convict defendant constable of such malicious conduct in making a levy as to justify the imposition of smart money. *Id.*. . . . . 302
4. **Term of Court—Adjournment by Sheriff.** A sheriff may in pursuance of an order of the court adjourn the term of the district court *sine die* without the personal presence of the

**SHERIFFS AND CONSTABLES—CONTINUED:**

- judge in the court room at the time the adjournment is announced. *Mulcahy v. City of Moline*..... 531
5. **Wrongful Levy—Punitive Damages—Financial Condition of Defendant.** In an action against a constable for a forcible and malicious levy it was proper to inquire into his financial condition, so that the finding as to punitive damages might be intelligently made. *Townsend v. Seefeld*..... 302

**SHERIFF'S DEED:**

1. **Mortgage Foreclosure—Sale—Confirmation—Sheriff's Deed—Attack—Homestead.** Where no appeal has been taken from a decree of confirmation of a sheriff's sale, mere irregularities of the sheriff's sale afford no basis for an attack upon the sheriff's deed issued in pursuance of such confirmation. *Catlin v. Deering & Co.*..... 256
2. ——— Nor can such deed be attacked on the ground that the land sold was occupied as a homestead and therefore exempt from sale on a general execution. *Id.*..... 256
3. **Mortgage Foreclosure—Sheriff's Sale—Valid Order of Sale—Void Execution.** A sheriff's sale of real estate made under a valid order of sale and a void execution is not a nullity, and after it has been confirmed and the decree of confirmation has become final the title of the purchaser is not open to attack on the ground of the invalidity of the execution. *Id.*..... 256

**SPECIFIC PERFORMANCE:**

1. **Oral Promise to Devise Property—Consideration—Heir's Release of Life Insurance.** Where the holder of a life insurance policy, desiring to collect its surrender value, induced his heir to sign a release under his oral promise to leave her at his death a certain share of his property, the release was a good consideration for the promise, and it may be enforced. *Stahl v. Stevenson*..... 447
2. **Sale—Interest in Land—No Consideration—Specific Performance.** A contract signed by a mother and two sons purporting to sell to the mother an interest of one son in land in which he had no interest, but which the mother owned absolutely, was without consideration, and specific performance of the contract will be refused. *Moon v. Moon*..... 737
3. **Sale of Land—Nonmarketable Title—Specific Performance.** Where a vendor agreed to furnish an abstract of title satisfactory to the vendee and the abstract furnished showed an unmarketable, title specific performance of the contract of sale was properly refused. *Canaday v. Miller*..... 577

**SPENDTHRIFT TRUSTS—See TRUSTS AND TRUSTEES, 6, 7.**

**STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.**

**STATUTES:**

1. **Appeal Bonds—Misdemeanor Cases—No Bail Bond—Constitutional Law.** The statutory appeal bond required of a defendant convicted of a misdemeanor is not a bail bond and does not violate the bill of rights which provides that "excessive bail shall not be required." *The State v. Coletti*..... 523
2. **Appeals—Appeal Bonds for Protection of State.** The statute providing that the bond to stay judgment of conviction in misdemeanor cases shall be approved by the judge is for the protection of the state alone, and not for the benefit of the defendant or his surety. *Id.*..... 523

## STATUTES—CONTINUED:

3. Appeals—Power of Legislature to Impose Terms. It is within the power of the legislature to impose additional requirements upon the exercise of the right to appeal to the supreme court from a criminal conviction, notwithstanding the provisions of section 8197 of the General Statutes of 1915, which gives an appeal "as a matter of right." *Id.*..... 523
4. Chiropractic Examiners—Fees go to State Treasurer in Official Capacity. Section 10 of chapter 291 of the Laws of 1913 requires the fees received by the state board of chiropractic examiners to be deposited with the state treasurer in his official capacity, and not with him as an agent of the board. *Robb v. Knapp* ..... 898
5. City School District—Annexing Adjacent Territory—Notice. The proceedings of a city school district in annexing adjacent territory under section 9129 of the general statutes of 1915 were in conformity to the statute and valid. *School District v. Board of Education* ..... 784
6. Descents—Widow's Interest in Deceased Husband's Lands—Life Estate. The statute giving a widow one-half in value of the real estate in which her husband in his life had a legal or equitable interest, refers to legal or equitable interest capable of inheritance. *Osborn v. Osborn*..... 890
7. ——— A widow has no interest, under the statute, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons," his interest being a life estate only. *Id.* ..... 890
8. Disqualification of Judge—Calling in Judge of another District. Where a district judge is disqualified to sit in a case, and he calls in the judge of another district, who after trying some of the issues declines to act further, it becomes the duty of the regular judge to request the judge of some other district to attend and serve as judge. *Berry v. Dewey*..... 392
9. Drainage District Supervisors—Tenure of Office—Constitutional Law. The provision in chapter 168 of the Laws of 1911 fixing the tenure of office of the supervisors of a drainage district at five years is violative of section 2 of article 15 of the constitution forbidding the legislature to create any office the tenure of which is longer than four years. *The State, ex rel., v. Drainage District* ..... 575
10. Enactment of Statute—Appropriation of Money by "Concurrent Resolution." Where a "house concurrent resolution" purporting to appropriate public money passed both houses, was approved by the governor, and in all respects received the same treatment as a regularly enacted bill, it will be regarded as a valid appropriation statute. *The State, ex rel., v. Knapp*, 701
11. Foreign Insurance Company—Where Suit May be Brought—Statute. Under section 53 of the civil code an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found, regardless of where the cause of action arose or of the residence of the plaintiff. *Snelling v. Benefit Association*..... 227
12. ——— The provisions in the last part of section 53 that an action against a foreign insurance company may be brought in any county where the cause of action, or some part thereof, arose is a permissive and cumulative and not an exclusive remedy. *Id.*..... 227

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13. **Heavy Vehicles—Planking Bridges—Statute Includes Horse-drawn Wagons.** Section 8799 of the General Statutes of 1915, providing that drivers of certain heavy vehicles on a public highway shall plank all bridges and culverts before driving across them, applies to and includes horse-drawn wagons. *White v. Kansas City*..... 495
14. **Insurance Companies—State Tax on Premiums—How Computed.** Under the statute the annual state tax of two percent upon all premiums received by foreign insurance companies should be computed only upon the total premiums collected, retained and devoted to the business of the insurance companies. *The State, ex rel., v. Wilson*..... 752
15. **Interstate Commerce—Injuries to Workman—Compensation Act Does Not Apply.** The workmen's compensation act does not extend to the case of a workman engaged in interstate commerce who without his employer's fault is injured in the course of his employment. *Matney v. Railway Co.*..... 293
16. **Motorcycle—Operation on Highway—Construction of Statute.** Chapter 65 of the Laws of 1913, making it unlawful for any person to operate a motorcycle on a public highway at a greater rate of speed than twenty-five miles per hour, was intended solely for the protection of others using such highway. *Walker v. Faelber*..... 646
17. **Oral Promise to Leave Property to Heir—Trust by Implication.** An oral promise by an ancestor for good consideration to leave at his death a share of his property to a presumptive heir impressed a trust upon his estate, which trust arises by implication of law. *Stahl v. Stevenson*..... 844
18. **Ouster—Clerk of City Court—Retaining County Money—Pleadings.** A petition for ouster of a clerk of a city court which alleges a willful failure to pay certain funds into the county treasury, as required by section 3310 of the General Statutes of 1915, states a cause of action under section 7603 of the General Statutes of 1915. *The State, ex rel., v. Fishback* ..... 178
19. ——— A misunderstanding of unambiguous statutes is no defense to an action of ouster based upon a willful violation of such statutes. *Id.* ..... 178
20. **Report of Referee—"Decision of Court"—Judgment.** The word "decision" in section 306 of the civil code, providing that the motion for a new trial must be filed within three days "after the verdict or decision is rendered," includes the decision constituted by the report of a referee on the whole issue. *Milling Co. v. Schreiber*..... 172
21. **Statute Authorizing Certain School Bonds Repealed.** Section 9081 of the General Statutes of 1915, authorizing certain school bonds, has been repealed by chapter 268 of the Laws of 1917. *Board of Education v. Clapp*..... 362
22. **Statutes—Amendment by Implication.** The provisions of the state constitution that "no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed" has no application to an amendment by implication. *The State v. Coletti*..... 523
23. **Taxation—Banks and Loan Companies—Statute.** The tax contemplated by section 11236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and

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loan and investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation. *Bank v. Geary County* ..... 334

24. White Slave Law—Regularly Enacted. Chapter 179 of the Laws of 1913, commonly known as the "white slave law" was regularly enacted. *The State v. Fleeman*..... 670

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## STIPULATION:

1. Judgment—Stipulation for Judgment—Estoppel to Deny Validity. Where a stipulation for judgment signed by attorneys for both parties is used by one party to procure a continuance on hearing of a motion such party is estopped from denying that his attorney signed such stipulation without authority. *Berry v. Dewey* ..... 392
2. Settlement—Stipulation—Time of Payment—Interest. Where under a written stipulation the amount for which judgment should be rendered was stated, and the time of payment was postponed to a future period, such payment should draw interest from the time such payments were to be made. *Id.* .... 392

## STREET RAILWAYS:

1. Automobile—Collision with Street Car—Proximate Cause. Where the proximate cause of a collision between a street car and an automobile was the unlawful speed at which the automobile was being driven, the plaintiff, who was an occupant, but not the driver of the automobile, was guilty of contributory negligence. *Fair v. Traction Co.* ..... 611
2. Automobile Crossing Railroad—Obstruction to View—Duty of Driver—Contributory Negligence. Where an automobile driver is about to cross a railroad track at a place where his view is obstructed it is his duty, before driving upon the track, to stop, look and listen, or otherwise assure himself of the fact that he can cross in safety. *Williams v. Electric Railroad Co.* ..... 268
3. ——— An automobile driver who attempted to cross a railway track where his view was obstructed, without stopping and ascertaining whether he could cross in safety, was guilty of contributory negligence barring recovery for damages from a collision. *Id.* ..... 268
4. Automobile Crossing Railroad—Trolley Car Violating Speed Ordinance—Negligence. To subject the owner of a trolley car to liability for the violation of a city speed ordinance in a damage suit by a private litigant, it must appear that the disobedience of the ordinance caused or aggravated the damages. *Id.* ..... 268
5. Automobile—Negligence of Driver—No Imputed Negligence to Minor Son. The negligence of a father in driving an automobile across a railroad track without stopping, looking or listening, cannot be imputed to his ten-year-old son who is riding with him. *Burzio v. Railway Co.* ..... 287
6. Injuries—Railroad Crossing—Findings—Instructions. Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of those terms, state facts and not conclusions of law. *Id.* ..... 287
7. Interurban Railway—Local Service in City—Control of Utilities Commission. Where an interurban railway operating through numerous cities extended its line into a city for local

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- service, the power to require local cars to run to a given point in such city at specified times is by statute vested in the utilities commission, and cannot be controlled by city ordinance. *In re Wright* ..... 329
8. Negligence—Railroad Crossing—Obstruction to View. Liability of a railroad company for injuries in collision between an automobile and a railroad car may be founded on negligence in allowing weeds, grass and brush to grow so as to obstruct the vision of those approaching the railroad crossing. *Burzio v. Railway Co.* ..... 287
9. Negligence—Street Car Track—Buggy Overturned—Death—Findings. In an action for damages for the death of a driver of a buggy occasioned by a street car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.* ..... 214
10. Negligence—Verdict—Findings—Interpretation. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Railway Co.* ..... 287

**SUBROGATION:**

1. Judgment—Joint Debtors—Satisfaction by One—Subrogation. A surety who satisfies a judgment against his principal, and files with the clerk a notice of his intention to claim repayment under section 474 of the civil code, has all the rights and remedies of an owner of the judgment for the purpose of enforcing repayment. *Kinkel v. Chase* ..... 275

**SURFACE WATER—See WATERS AND WATERCOURSES, 1-3.**

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**TAXATION:**

1. Defective Notice of Amount to Redeem—Voidable Tax Deed. If in a final redemption notice to redeem from tax sale the sum stated as necessary to redeem be substantially greater than the amount properly chargeable under the statutes a tax deed based thereon is voidable. *Jones v. Harper* ..... 539
2. Insurance Companies—State Tax on Premiums—How Computed. Under the statute the annual state tax of two percent upon all premiums received by foreign insurance companies should be computed only upon the total premiums collected, retained and devoted to the business of the insurance companies. *The State, ex rel., v. Wilson* ..... 752
3. Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Improper Deductions. In assessing for taxation shares of stock no deduction may be made for real estate in other states owned by banks or by loan and investment companies. *Bank v. Geary County* ..... 334
4. ——— No deduction for the assessed value of shares of stock of banks can be made on account of real estate acquired in the ordinary transaction of business which is retained beyond the periods limited by the state and federal laws for holding such real estate. *Id.* ..... 334
5. Taxation—Banks and Loan Companies—Assessments—Shares of Stock—Proper Deductions. The assessed value of real estate generally, and not merely the banking house or office

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- building, and real estate representing an investment of original capital stock, may be deducted from the value of shares of stock, for the purposes of taxation. *Id.*..... 334
6. — In the case of state banks, the deduction on account of real estate necessary for the convenient transaction of business, including furniture and fixtures, may not exceed the value of real estate which the bank has capacity to hold for that purpose. *Id.* ..... 334
7. — The limitation stated above does not apply to national banks or loan or investment companies. *Id.*..... 334
8. **Taxation—Banks and Loan Companies—No Deductions for Real Estate in Other States—Constitutional Law.** The prohibition upon deducting from the value of shares of stock of state banks and loan or investment companies the value of real estate situated in a foreign state does not infringe the fourteenth amendment to the constitution of the United States. *Id.* ..... 334
9. — The prohibition does not result in double taxation by this state. *Id.*..... 334
10. **Taxation—Banks and Loan Companies—Reasonable Classification.** The classification of loan and investment companies with state and national banks for purposes of taxation is a reasonable classification, which does not infringe the constitutional requirement that taxes shall be assessed and levied at a uniform and equal rate. *Id.*..... 334
11. **Taxation—Banks and Loan Companies—Shares of Stock—Assessable at Full Value.** Shares of stock in banks and loan companies are to be assessed at their true value, which may or may not coincide with their bookkeeping value. *Id.*..... 334
12. **Taxation—Banks and Loan Companies—Statute.** The tax contemplated by section 11236 of the General Statutes of 1915, relating to taxation of national banks, state banks, and loan and investment companies, is a tax on shares of stock in the hands of stockholders, and not a tax on capital stock or assets, the property of the corporation. *Id.*..... 334
13. **Taxation—Banks and Loan Companies—Value of Shares of Stock—Properly Determined.** Conduct of the state tax commission in arriving at the true value of shares of stock, not fraudulent or so arbitrary or capricious as to amount to fraud, is not subject to review by the courts. *Id.*..... 334

## TAX DEEDS—See TAXATION, 1.

## TELEGRAPHS AND TELEPHONES:

1. **Contract by Telegram—Sale of Melons—Evidence for Jury.** Under the facts disclosed by the plaintiff's evidence, and stated in the opinion, it was not error for the court to overrule a demurrer to that evidence. *Bruce v. Hays*..... 115
2. **Contract by Telegram—Sale of Melons—Instruction Not Prejudicial.** As against a defendant there is no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify the instruction. *Id.* ..... 115
3. **Dismantling Telephone Line—Another Efficient Line Established.** The dismantling of a direct telephone line between two places does not constitute an objectionable change in service, where another equally efficient line, though not a direct one, between the two points is established. *The State, ex rel., v. Telephone Co.*..... 818

**TELEGRAPHS AND TELEPHONES—CONTINUED:**

4. **Gratuitous Service—Discriminatory Practice.** The gratuitous allowance by one telephone company of the use by another company of a line owned by it, constitutes a discriminating practice forbidden by the statute, and therefore is not one which the utilities commission can require to be continued. *Id.*, 318
5. **Negligence—Telephone Wires—Injuries—Prima Facie Case—Burden of Proof.** Where a plaintiff has proved that he sustained injuries through the dangerous situation of a telephone wire hanging across a public highway, the burden passes to the telephone company to show facts excusing the dangerous condition of the highway. *Walmsley v. Telephone Association* ..... 139
6. **Negligence—Trial—No Prejudicial Error in Record.** The record, in an action to recover damages for personal injuries sustained through the negligent maintenance of a telephone wire across a public highway, examined, and no prejudicial error discerned therein. *Id.* ..... 139
7. **Telephone Wire over Highway—Injuries—Evidence.** Negligence in the maintenance of a telephone wire across a public highway is sufficiently established when it is shown that the wire hung so low as to interfere with the customary use of the highway. *Id.* ..... 139
8. **Utilities Commission—Order Enforceable by Mandamus.** This court has jurisdiction to enforce by mandamus an order of the utilities commission, notwithstanding the pendency in the district court of an action to enjoin its enforcement. *The State, ex rel., v. Telephone Co.* ..... 318
9. **Utilities Commission—Telephone Line Discontinued—Restoration Ordered—Mandamus Denied.** Where a telephone line is discontinued without consent of the utilities commission, and facts are shown to that tribunal which would have compelled the granting of such consent had it been asked, obedience of an order of the utilities commission directing restoration will not be compelled by mandamus. *Id.* ..... 318

**THEATERS AND SHOWS:**

1. **Censorship—Conclusiveness of Determination—Statute—Review.** The Kansas board of review has full power to determine whether films offered for its examination and decision are proper for exhibition, and its determination is not open to review unless its action is fraudulent or beyond its jurisdiction. *Photoplay Corporation v. Board of Review* ..... 356
2. ——— Under section 15 of chapter 308 of the Laws of 1915, redress for an aggrieved party is not a reexamination of a picture by the court, nor exercise of administrative and nonjudicial power, but is such redress as the court may give. *Id.*... 356

**TITLE AND OWNERSHIP:**

1. **Adverse Possession—Payment of Taxes as Evidence.** Payment of taxes, although not a controlling circumstance, is one of the means by which ownership is asserted, and the failure to pay taxes weakens a claim of ownership by adverse possession. *Finn v. Alexander* ..... 607
2. **Adverse Possession—Requisite to Obtain Title.** Title to land of another cannot be acquired by adverse possession unless the possession is open, notorious, hostile and exclusive, and of such nature that the owner may be presumed to know the occupant is claiming a title inconsistent with his own. *Id.*... 607

## TITLE AND OWNERSHIP—CONTINUED:

3. ——— Occupancy of land in common with the owner, or with his consent and in recognition of his right, is not sufficient to constitute adverse possession. *Id.*..... 607
4. "Bond to Quiet Title"—Misdescription of Land—Reformation. Where there was a mistake in the description of land as given in a "bond to quiet title" and no reformation was asked, it was not prejudicial error for the trial court to treat the bond as reformed to correspond with the facts proven. *Snodgrass v. Snodgrass* ..... 281
5. "Bond to Quiet Title"—Tender of Quitclaim Deed—Sufficient Performance. In an action upon a bond given "to quiet title" to certain described lands, a tender of a quitclaim deed which quieted the title in plaintiff to all the land he could rightly claim was a sufficient performance of the conditions of the bond. *Id.* ..... 281
6. Deed by Wife—Nonjoinder of Husband—Husband's Interest Not Conveyed. Where a wife conveyed land owned by her, without her husband joining in the deed, and the land not having been a homestead nor sold for payment of debts, the husband upon the decease of the wife became absolute owner of a one-half interest in such land. *Murray v. Murray*..... 184
7. ——— The plaintiff's allegation that the wife was unduly influenced was immaterial, as she could not convey his interest in the land without his consent. *Id.*..... 184
8. Deeds in Escrow—Fraud Discovered—Rescission of Contract—Reconveyance. Where deeds to land are deposited in escrow to await final payment, no title passes until full payment is made, and where the grantee is entitled to rescind on the ground of fraud discovered no formal offer to reconvey the property is required. *Business Blocks Co. v. Gregory*..... 33
9. Oil and Gas Lease—No Conveyance of Real Estate. The provisions of an oil and gas lease examined, and held the instrument did not operate to sever and convey as real estate sub-surface mineral deposits. *Hover v. McNeill*..... 492
10. Public Lands—Congressional Grant—Railroad Right of Way—Vested Title. Under the acts of congress of 1862 and 1864 the Union Pacific Railroad Company became the owner in fee of a right of way 200 feet on either side from the center of the track, which right is superior to claims subsequently initiated and is not defeated by adverse possession. *Railroad Co. v. Davenport* ..... 513
11. Sale of Land—Interest on Payments—Abstract of Title. Under the evidence and terms of the contract the vendor of land was entitled to interest on deferred payments from the date of the contract and when the abstract of title was approved. *Gillidett v. Hayden*..... 616
12. Sale of Land—Nonmarketable Title—Specific Performance. Where a vendor agreed to furnish an abstract of title satisfactory to the vendee, and the abstract furnished showed an unmarketable title, specific performance of the contract of sale was properly refused. *Canaday v. Miller*..... 577
13. Town Site—Control of Levees and Streets—Cannot be Devested by City. A city cannot by executing a deed of conveyance to a part of a public levee disable itself in its public municipal power nor relinquish its public municipal duty to control the property for the public good. *Douglas County v. City of Lawrence* ..... 656

## TITLE AND OWNERSHIP—CONTINUED:

14. **Town Site—Control of Levees and Streets—Vested in City.** The lawful possession, dominion and control of all levees, streets and the like, dedicated to the public by the founders of a town site, are vested in the city by operation of law. *Id.* . . . 656
15. **Town Site—Levees and Streets Dedicated—Fee in County in Trust.** When the founders of a city or town execute, file and record the plat of the property devoted by them to town-site purposes, the fee title of the levees, streets, alleys, parks and the like vests in the county forever in trust for the public by operation of law. *Id.* . . . 656
16. **Town Site—Levees—Nonuse—Adverse Possession—Statute of Limitations.** Duties and privileges conferred and imposed upon a municipal corporation exclusively for the public benefit cannot be lost through nonuse, estoppel or adverse possession, and statutes of limitation are not ordinarily applicable thereto. *Id.* . . . 656
17. **Will—Construction—Life Estate—Estates in Remainder—Vested Title.** Where a testator bequeaths a life estate to his widow, and the remainder undivided to his sons, the sons acquire a vested remainder in the property, and they may sell and dispose of their undivided interests. *Stevenson v. Stevenson* . . . 80
18. ——— **After a testator had thus disposed of his property by will a subsequent provision in the will did not fairly imply that the sons might not absolutely dispose of the undivided interests vested in them by their father's will.** *Id.* . . . 80
19. **Will—Perpetuities—Void Provisions—Descent of Estate.** Where a will fails because it offends the rule against perpetuities the property thus ineffectually disposed of vests at once in the heirs at law of the deceased. *Lasnier v. Martin*, 551

## TORT-FEASORS—See TORTS.

## TORTS:

1. **Action on Tort—New Action on Contract—Statute of Limitations.** An action for damages resulting from negligence is not the same as one on a contract of settlement, and the pendency of an action founded on such a contract does not suspend the running of the statute of limitations against an action on the tort. *Thompson v. Railway Co.* . . . 668
2. **Detective Agent—Assaulting Suspected Criminal—Extorting Confession.** Where a detective agency authorized its representative to obtain a confession from a suspect, and in executing that authority an unlawful assault and battery is committed upon the suspect, the detective agency is liable for the damages resulting from the unlawful assault. *Mansfield v. Detective Agency* . . . 687
3. **Joint Tort-feasors—Compromise with Part of Them.** On an oral compromise with several joint tort-feasors, a reservation of the right to proceed against the other joint tort-feasors may be made orally. *Scott v. Fair Association* . . . 653
4. **Joint Tort-feasors—Damages—Contribution.** It is a general rule that where one of several joint tort-feasors is compelled to pay damages for the joint wrong of all he cannot enforce contribution or secure reimbursement from any of the other tort-feasors. *Rucker v. Allendorph* . . . 771
5. **Tort—Photograph in Moving Picture—Rights of Privacy—Damages.** The exhibition in a moving-picture theater of the

**TORTS—CONTINUED:**

photograph of a person taken without her consent and for the purpose of exploiting the publisher's business, is a violation of the right of privacy and entitles her to recover without proof of special damage. *Kunz v. Allen*..... 883

6. Tortious Act of Servant—Liability of Principal. A master is responsible for the tortious acts of his servant where such acts are incidental to and done in furtherance of the business of the master, even if such acts are done willfully or in excess of the authority conferred. *Mansfield v. Detective Agency* ..... 687

**TRANSCRIPTS:**

1. Transcript from Justice of Peace—Filed in Another County—Sheriff's Sale—Open to Attack. An attempt to redeem real property from a sheriff's sale made under an execution that is void does not ratify the proceedings nor cure the defect in the jurisdiction. *Duncan v. Investment Co.*..... 725
2. Transcript from Justice of Peace—Filed with District Clerk of Another County—Void Execution. Where a transcript of a judgment of a justice of the peace is filed with the district clerk and a copy of such transcript is filed with the district clerk of another county, the district court of the latter county has no jurisdiction to issue an execution thereon, or to confirm a sheriff's sale made thereunder. *Id.*..... 725

**TRIAL—See PLEADING AND PRACTICE.****TROVER AND CONVERSION.**

1. Damages—Storage Charges. The plaintiff is entitled to set up a claim for storage charges as damages for conversion. *Tire Co. v. Kirk*..... 418

**TRUSTS AND TRUSTEES:**

1. Oil and Gas Lease—Group of Buyers—Title in Trust for All—Innocent Purchasers. Where an oil and gas lease is executed to a member of a group of buyers, who takes title for the benefit of all, one who buys from the trustee with notice of the trust acquires no beneficial title against the actual owners. *Goss v. Rothrock*..... 272
2. Oil Lease—Oral Contract—Statute of Frauds—Trusts. Where an oil and gas lease negotiated by several lessees is made to one of them as trustee for the benefit of all, and each of the group of buyers subsequently paid his share, their claims cannot be defeated on the ground that the transaction was within the statute of frauds. *Id.*..... 272
3. ——— Neither the trustee holding title for the benefit of buyers of an oil lease, nor any purchaser from him with notice, can defeat the trust on the ground that it was not created or evidenced by writing. *Id.*..... 272
4. Oil Lease—Sale by Trustee—Ratification by Owners—Estoppel. Where a trustee makes a sale of an oil lease a beneficial owner of the lease who elects to look to such trustee for his share of the purchase price thereby ratifies the sale, and is estopped from claiming title as against the purchaser at such sale. *Id.*..... 272
5. Oral Promise to Leave Property to Heir—Trust by Implication. An oral promise by an ancestor for good consideration to leave at his death a share of his property to a presumptive heir impressed a trust upon his estate which trust arises by implication of law. *Stahl v. Stevenson*..... 844

## TRUSTS AND TRUSTEES—CONTINUED:

6. **Proceedings in Aid of Execution—Will—"Spendthrift Trust."**  
To create a spendthrift trust a will need not expressly declare that the interest of the *cestui que trust* shall be beyond the reach of his creditors. It is sufficient if the intention can be clearly ascertained from the whole will. *Everitt v. Haskins*, 546
7. ——— In the present case the will created a spendthrift trust and the trust property cannot be reached by creditors of the *cestui que trust*. *Id.*..... 546
8. **Town Site—Control of Levees and Streets—Vested in City.**  
The lawful possession, dominion and control of all levees, streets and the like, dedicated to the public by the founders of a town site, are vested in the city by operation of law. *Douglas County v. City of Lawrence*..... 656
9. **Town Site—Levees and Streets Dedicated—Fee in County in Trust.** When the founders of a city or town execute, file and record the plat of the property devoted by them to town-site purposes, the fee title of the levees, streets, alleys, parks and the like vests in the county forever in trust for the public by operation of law. *Id.*..... 656

## U.

UNDUE INFLUENCE—See GIFTS, 1.

## V.

## VENDOR AND PURCHASER:

1. **Action on Bond to Quiet Title—Evidence.** In a suit on a bond to quiet title under which the obligor had tendered a quitclaim deed, held, that sustaining a demurrer to plaintiff's evidence was not error. *Snodgrass v. Snodgrass*..... 281
2. **Bond to Quiet Title—Tender of Quitclaim Deed—Validity—Conditions.** On tender of a quitclaim deed on condition that it be accepted in satisfaction of a bond to quiet title, which condition had no proper place in the tender, yet as the deed quieted title to all land which plaintiff could rightfully claim, it did not make the tender void. *Id.*..... 281

## VENUE:

1. **Action to Compel Reconveyance—Fraud—Action Transitory.**  
An action to compel the defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud is transitory and not local, and may be brought in any county where personal service can be had upon him. *Zane v. Vawter*..... 887
2. ——— The statute requiring actions "for the determination in any form" of an interest in real property to be brought in the county where it is situated relates to action operating directly on the property, and does not apply where it is sought to control the personal conduct of defendant. *Id.*..... 887
3. **Change of Venue—Disqualification of Judge.** Where a change of venue is granted for disqualification of a regular judge and another judge is called in, who, after trying some issues declines to act further, the regular judge should request the judge of some other district to serve. *Berry v. Dewey*..... 392
4. **Foreign Insurance Company—Process—Service on Agent.**  
Service upon a duly licensed general agent of a foreign insurance company whose principal office is in the county is



## VENUE—CONTINUED:

- sufficient to give the court jurisdiction of the company. *Snelling v. Benefit Association*..... 227
5. ——— To acquire jurisdiction in the way stated does not violate the fourteenth amendment to the federal constitution. *Id.*..... 227
6. Foreign Insurance Company—Where Suit May be Brought—Statute. Under section 53 of the civil code an action against a foreign insurance company to recover upon a policy of insurance may be brought in any county where it may be found, regardless of where the cause of action arose or of the residence of the plaintiff. *Id.*..... 227
7. ——— The provision of section 53 of the civil code that an action against a foreign insurance company may be brought in any county where the cause of action or some part thereof arose is a permissive and cumulative remedy and not an exclusive remedy. *Id.*..... 227

## VERDICT AND FINDINGS:

1. Compensation Act—Injuries—Judgment Not Excessive. Under the compensation act a judgment for \$1,690 for accidental injuries to a workman's eye does not appear excessive. *Stuart v. Kansas City*..... 307
2. Condemnation Proceedings—Damages—Findings Not Conflicting. In condemnation proceedings a special finding that there was no evidence of the depreciation of each part of a farm lying on either side of the right of way does not conflict with another finding of the damages to the land as a whole. *Calkins v. Railroad Co.*..... 835
3. Condemnation Proceeding—Not a "Quotient Verdict." Where each juror set down his estimate of damages and these were added and the amount divided by twelve, and the jury finally reached a verdict materially different from the quotient, the verdict was not a "quotient verdict." *Schaafe v. Railway Co.*, 470-
4. Contract of Employment—Consistent Findings. In an action against an estate for services performed for decedent there was no inconsistency in the findings relative to the time when payment was to be made for such services. *Dubbs v. Hawthorth* ..... 603
5. Injuries—Railroad Crossing—Findings—Instructions. Where a jury has been properly instructed concerning negligence and reasonable and ordinary care and diligence, the answers to special questions which depend for their interpretation on the definition of these terms, state facts and not conclusions of law. *Burzio v. Railway Co.*..... 287
6. Insurance—Loss—Inconsistent Findings—New Trial. The court granted a new trial of the cause because the verdict returned by the jury was not supported by the evidence and because the special findings were inconsistent. Held, not error. *Tersina v. Insurance Co.*..... 87
7. Island Lands—Findings—New Trial Granted—No Error. Where numerous findings were made by a jury, and upon the whole record it appears that a new trial was ordered because the trial judge disagreed with the jury on the facts, the order granting a new trial is not reviewable. *Warner v. Snook*.... 814
8. ——— Although the trial court did not set aside the findings of the jury, yet unless it appears from the record that the court approved such findings this court on appeal from an

VERDICT AND FINDINGS—CONTINUED:

- order granting a new trial will not order judgment on such findings. *Id.* ..... 814
9. Life Insurance — Verdict — Instructions. The evidence supported the verdict and there was no error in the giving or refusing of instructions. *Sharrer v. Insurance Co.* ..... 650
10. Negligence—Findings Contrary to Evidence—New Trial. A verdict of the jury must be set aside where special findings material to its support are determined by the court to be contrary to the evidence. *Brice-Nash v. Street Railway Co.* .... 36
11. Negligence—Personal Injuries—Proper Special Questions. In an action to recover for injuries negligently inflicted it is proper to request the jury to find what the defendant's acts of negligence were. *Eastman v. Railway Co.* ..... 400
12. ——— A submitted question is examined and not found to contain any pitfall or trap for the unwary juror. *Id.* ..... 400
13. Negligence — Street-car Track—Buggy Overturned—Death—Findings. In an action for damages for the death of a driver of a buggy occasioned by a street-car track extending above the surface of the street, the findings were not inconsistent with each other nor with the verdict for plaintiff. *Adams v. Electric Railway Co.* ..... 214
14. Negligence—Verdict—Findings—Interpretation. The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Railway Co.* ..... 287
15. Note—Defense of Payment — Findings — Evidence—Agency. In an action on a promissory note executed by defendant and two sureties, a finding that payment was made by defendant to the sureties, and that they were the duly authorized agent of the payee to receive payment, is contrary to the evidence and the undisputed facts. *Studebaker Corporation v. Bell.* .... 259
16. Personal Injuries — Findings — Contributory Negligence. In an action against a city for injuries sustained by a pedestrian striking her foot against the end of a plank, the findings of the jury did not as a matter of law convict the plaintiff of contributory negligence. *Weaver v. City of Cherryvale.* ..... 475
17. Personal Injuries—Findings—Verdict—New Trial at Subsequent Term. Where at a subsequent term the court granted a new trial because of such findings, no motion therefor having been filed by either party, such ruling is reversible on appeal. *Id.* ..... 475
18. Report of Referee—New Trial Denied—No Appeal—Judgment. Where judgment was rendered upon the findings of fact and conclusions of law in a referee's report, and grounds for a new trial were not presented in time, and no appeal was taken from an order denying a new trial, the judgment will be affirmed. *Bank v. Bank* ..... 412
19. Reward—Apprehending Criminal — Trial — Evidence. There was no material inconsistency in the findings of the jury. *Smith v. Fenner* ..... 830
20. ——— The evidence was held sufficient to support the finding, verdict and judgment that plaintiff had earned the reward offered by defendant. *Id.* ..... 830
21. Sale of Land — Interest on Payments — Abstract of Title. Under the evidence and terms of the contract the vendor of land was entitled to interest on deferred payments from the

## VERDICT AND FINDINGS—CONTINUED:

- date of the contract and when the abstract of title was approved. *Gillidett v. Hayden* ..... 616
22. Sale of Land—Nonmarketable Title—Specific Performance. Where a vendor agreed to furnish an abstract of title satisfactory to the vendee, and the abstract furnished showed an unmarketable title, specific performance of the contract of sale was properly refused. *Canaday v. Miller*..... 577
23. Sale of Mechanical Milker—Damages—Findings. In an action for the purchase price of a milk separator, and mechanical milker, the findings of damages in favor of defendant from defects in the article were not inconsistent nor unsupported by evidence. *Cream Separator Co. v. Abbott*..... 265
24. Uninsulated Wires—Injuries—Trial—Findings Construed. A finding to the effect that a loose wire had been in contact with the wires of an electric light company so long that it ought to have discovered it before the occurrence of an accident was held not supported by the evidence. *Storm v. Light Co.*..... 40
25. ——— A finding that the company's wires would not have injured any one using the streets in a way reasonably to have been foreseen, held not to mean that the throwing of a loose wire across them could not have been anticipated by the exercise of ordinary caution. *Id.*..... 40
26. Wrongful Death—Verdict Not Excessive. In an action brought by a mother to recover for the wrongful death of her son, a verdict and judgment for \$5,000 is not excessive where the deceased was 33 years old at the time of his death, was in good health and vigorous, and was accumulating property. *Berry v. Dewey* ..... 593
27. ——— Financial benefits derived by the heir of a person who has lost his life by the wrongful act of another cannot be deducted from the damages sustained and the verdict and judgment be reduced by the benefits received. *Id.*..... 593

VERIFICATION—See EXECUTORS AND ADMINISTRATORS, 4, 5.

## W.

WAIVER—See CRIMINAL LAW, 13; DEPOSITIONS 1; NEGOTIABLE INSTRUMENTS, 15-17.

WARRANTS—See SCHOOLS AND SCHOOL DISTRICTS, 8-11.

## WARRANTY:

1. Deed—Breach of Warranty—Incumbrances—Mutual Mistake—Presumptions. Where a deed contained a warranty against incumbrances the presumption is that the deed contained the agreement of the parties, but such presumption may be overcome by evidence which incontrovertibly shows that this covenant was inserted by mutual mistake. *Zuspann v. Roy*..... 188
2. ——— A mutual mistake in a deed conveying real property may be shown although the parties thereto did not, before it was signed, carefully examine it to ascertain whether it expressed their agreement. *Id.*..... 188
3. ——— A mutual mistake in a written contract is one that is made by all the parties thereto. *Id.*..... 188
4. Sale—Breach of Warranty—Burden of Proof. In an action for breach of warranty in the sale of a jack, where the facts touching the alleged failure of warranty were peculiarly

**WARRANTY—CONTINUED:**

- within the knowledge of the vendee, it was proper to impose upon the vendee the burden of showing that the jack did not measure up to the warranty. *Eagan v. Murray*..... 193
5. Sale — New Contract — Effect of Conditional Sale — No Renewal of Chattel Mortgage. After a sale and rescission of a contract of purchase of a machine a new contract of conditional sale of the same machine entered into did not reanimate a chattel mortgage covering the machine which was extinguished by the former rescission. *Implement Co. v. Willhite*, 56
6. Sale of Jack—Breach of Warranty—Petition—Prayer for Relief. Ordinarily a petition which narrates several distinct breaches of a valid contract states a cause of action with sufficient precision against the party who breached the contract, although the prayer may be for alternative relief, and a cause of action so pleaded is good against a demurrer. *Eagan v. Murray*..... 193
7. ——— The prayer of a petition is no part of the statement of facts, and if the cause of action is stated and proved the court will adjudge and decree the proper legal redress, which may or may not conform in whole or in part with the relief prayed for. *Id.*..... 193
8. Sale of Threshing Machine—Note and Mortgage—Breach of Warranty—Rescission. Where a machine is sold with warranty, and notes and chattel mortgage given, and the machine fails to fill the warranty, the purchaser may rescind the contract, and thereby effect the extinguishment of the chattel mortgage. *Implement Co. v. Willhite*..... 56
9. ——— The facts relating to a return of a threshing machine, which has proved altogether worthless for the purpose for which it was bought, examined, and held that there was a substantial compliance with the contract provisions as to the place to which it was to be returned. *Id.*..... 56

**WATERS AND WATERCOURSES:**

1. Surface Water—Drainage—Depression—Not a Watercourse. A depression on plaintiff's land into which surface water from defendant's land flowed in time of heavy rains was not necessarily a natural watercourse into which defendant might lawfully drain the surface waters from his land. *Evans v. Diehl* ..... 728
2. ——— A depression into which surface and standing waters may be drained is not necessarily a natural watercourse merely because flood waters from a neighboring river find their way into that depression when the river is in flood. *Id.*, 728
3. Surface Water — Drainage — Injuring Neighbor's Land—Injunction. Findings of fact on which a judgment enjoining the maintenance of a drain and ditch was based, examined, and no substantial conflict discerned therein. *Id.*..... 728

**WHITE SLAVE LAW—See CRIMINAL LAW, 21, 30-36.**

**WILLS:**

1. Construction of Will—Evidence—Statements of Testatrix. It is not error to exclude evidence of statements made by the testatrix to the scrivener that she wanted each of the devisees to share equally with the others. *Neil v. Stuart*..... 242
2. Construction of Will—Free from Ambiguity. The will not being ambiguous the trial court correctly refused evidence ex-

## WILLS—CONTINUED:

- planatory of the devisor's intentions, and properly struck from the answer allegations of what such intentions were. *Postlethwaite v. Edson*..... 104
3. Construction of Will—Interest of Devisees. A clause in a will providing that "the property is to be sold and divided among my brothers and sisters' children and David R. Neil and Andrew Neil, also Lulu Keith equally" is construed to mean that the three persons last named take equally with each of the nephews and nieces per capita. *Neil v. Stuart*..... 242
  4. Construction of Will—Life Estate—Remainders—Judgment Liens—Homestead. Under a joint will executed by husband and wife, as survivor, took a life estate with power of disposition, and upon her failure to make disposition during life the children took the remainder subject to a judgment lien against the husband. *Postlethwaite v. Edson*..... 104
  5. ——— The homestead character of real estate depends upon family occupancy—not on the source of title. *Id.*..... 104
  6. Judgment against Testator—Lien on Testator's Interest in Land. In an action by a judgment creditor against the estate of the judgment debtor only the actual interest of the judgment debtor in property can be appropriated. *Id.*..... 104
  7. Oral Promise to Leave Property to Heir—Law of Wills Does Not Apply. A contract by which the obligor undertakes to make provision at his death for the obligee, although no present title to any property passes, is not required in order to be valid to be executed in accordance with the statute relating to wills. *Stahl v. Stevenson*..... 844
  8. Proceedings in Aid of Execution—Will—"Spendthrift Trust." To create a spendthrift trust a will need not expressly declare that the interest of the *cestui que trust* shall be beyond the reach of his creditors. It is sufficient if the intention can be clearly ascertained from the whole will. *Everitt v. Haskins*, 546
  9. Will—Construction—Life Estate—Estates in Remainder—Vested Title. Where a testator bequeaths a life estate to his widow, and the remainder undivided to his sons, the sons acquire a vested remainder in the property, and they may sell and dispose of their undivided interests. *Stevenson v. Stevenson* ..... 80
  10. ——— After a testator had thus disposed of his property by will a subsequent provision in the will did not fairly imply that the sons might not absolutely dispose of the undivided interests vested in them by their father's will. *Id.*..... 80
  11. Will—Devise of Homestead—Rights of General Creditors. "Creditors," as the expression is used in section 11752 of the General Statutes of 1915 concerning wills means and includes general creditors. *Postlethwaite v. Edson*..... 619
  12. ——— Where a judgment debtor by will devised his homestead to a devisee who never occupied the land, such devisee took the land subject to the rights of the judgment creditors of the testator. *Id.* ..... 619
  13. Will—No Conveyance or Alienation of Real Estate. Rule followed that a will is not a conveyance or an alienation of the real estate described therein. *Id.*..... 619
  14. Will—Perpetuities—Void Provisions—Descent of Estate. Where a will fails because it offends the rule against perpetuities the property thus ineffectually disposed of vests at once in the heirs at law of the deceased. *Lasnier v. Martin*.. 551

## WILLS—CONTINUED:

15. Will—Rule against Perpetuities. The rule against perpetuities is that no future interest in property can lawfully be created which does not necessarily vest within twenty-one years after some life or lives presently in being. *Id.*..... 551
16. ——— Provisions of a will which direct that no disposition of certain property shall be made “within twenty-one years after the death of my beloved wife” are void under the rule against perpetuities. *Id.* ..... 551
17. Written Instrument—Testamentary in Character. An instrument which described itself as a “will testament” which contained no word appropriate to a present grant of land therein described is held to be wholly testamentary in character, although acknowledged and recorded and not witnessed. *Coburn v. Simpson* ..... 234
18. Written Instrument—Testamentary in Character—Pleadings—Title—Gifts. In addition to claims of title by a written conveyance the answer also presented the issue of the passing of title by an oral gift, followed by possession and lasting and valuable improvements. *Id.* ..... 234

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- “Adverse Possession.” *Finn v. Alexander*..... 607
- “Agreement Not to Be Performed Within a Year.” *Stahl v. Stevenson* ..... 447
- “Alienation” (will not an alienation). *Postlethwaite v. Edson*, 619
- “Appeal Bond” (not bail bond). *State v. Coletti*..... 523
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- “Bill” (legislative enactment). *State v. Knapp*..... 701
- “Capital Stock” (taxation). *Bank v. Geary County*..... 334
- “Colorable Transaction” (fraudulent transfer). *Osborn v. Osborn* ..... 890
- “Constructive Adverse Possession.” *Canaday v. Miller*..... 577
- “Contract for the Sale of an Incorporeal Hereditament.” *Robinson v. Smalley* ..... 842
- “Conveyance” (by will). *Postlethwaite v. Edson*..... 619
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- “Express Trust.” *Stahl v. Stevenson*..... 844
- “Extra” (building contract). *Contracting Co. v. Railway Co.*, 799
- “Family” (homestead rights). *Koehler v. Gray*..... 878
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- “Implied Trust.” *Stahl v. Stevenson*..... 844
- “Indemnity against Liability.” *City of Topeka v. Ritchie*.... 384
- “Indemnity against Loss.” *City of Topeka v. Ritchie*..... 384

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| "Interstate Commerce." <i>Defenbaugh v. Railway Co.</i> .....                        | 569 |
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## WORKMEN'S COMPENSATION ACT:

1. City—Constructing Sewer—Injuries to Workman Not Within Terms of Compensation Act. While constructing a sewer a city is not engaged in an enterprise involving any element of gain or profit, and does not come within the terms or operation of the workmen's compensation act. *Redfern v. City of Anthony* .....
2. Compensation Act—Assignment of Judgment. The question whether an injured workman may assign a judgment under the workmen's compensation act to a trustee for the benefit of his children considered but not determined. *Monson v. Battelle* .....
3. Compensation Act—Injuries from Sportive Acts of Coemployee—Liability of Employer. If an employee is assaulted by a fellow workman, whether in anger or in play, the employee is not entitled to compensation therefor unless in a case where the employer knows that the habits of the guilty servant are such that it is unsafe for him to work with other employees. *Stuart v. Kansas City* .....
4. Compensation Act—Injuries—Judgment Not Excessive. Under the compensation act a judgment for \$1,690 for accidental injuries to a workman's eye does not appear excessive. *Id.*....
5. Compensation Act—Injuries—Sportive Acts of Coemployee—Recovery. Where an employee was injured by having mortar playfully thrown into his eye by a coemployee and the em-

**WORKMEN'S COMPENSATION ACT—CONTINUED:**

- ployer knew of the habit of the coemployee of playing jokes or pranks on other workmen, the employer was liable under the compensation act for the injuries so inflicted. *Id.*..... 307
6. — Under the workmen's compensation act a workman who is injured in the performance of his labor is entitled to compensation, although he cannot explain how the accident occurred. *Id.* ..... 307
7. Compensation Act—Injury to Minor—Presentation of Claim—Statute of Limitations. The action of a minor by his next friend to recover under the workmen's compensation act is not barred because the written claim for compensation was not served within three months from the date of the injury—no guardian having been appointed. *Minturn v. Manufacturing Co.* ..... 885
8. Compensation Act—Judgment—Death of Employee—Revivor. A lump sum judgment in favor of a workman under the workmen's compensation act, although the statute forbids its assignment, does not abate by his death, but may be revived in the name of the administrator. *Monson v. Battelle*..... 208
9. Compensation Act—Judgment—Motion for New Trial—Properly Denied. In an action under the compensation act the petition of defendant for a new trial on the ground of fraud and newly discovered evidence did not state facts sufficient to compel the granting of a new trial. *Lombard v. Planing Mill Co.*..... 780
10. Compensation Act—"Notice of Trial"—Demand for Jury—Statute Construed. Section 5930 of the General Statutes of 1915 in relation to "notice of trial" and time to "demand a jury trial" is construed to mean that when a case under the compensation act is called for trial if neither party demand a jury the right to a jury trial is waived. *Vogler v. Bowersock* ..... 456
11. Compensation Act—Pain from Injuries—Right to Compensation Therefor. Under the workmen's compensation act compensation can be recovered where inability to labor is caused by pain resulting from an injury received in an accident arising out of and in the course of the employment. *Trowbridge v. Wilson & Co.* ..... 521
12. Compensation Act—Petition for New Trial—Proceeding on Appeal. The evidence held to support a finding that the plaintiff was injured on the premises where he was employed, by having to wade through flood water, an old wound on his foot being thereby infected, requiring amputation. *Monson v. Battelle* ..... 208
13. — Such an injury is one "by accident," within the meaning of the phrase as used in the statute. *Id.*..... 208
14. — Such an injury is one arising out of and in the course of plaintiff's employment, within the meaning of the statute. *Id.* ..... 208
15. Compensation Act—Release—Mutual Mistake. The paper relied on as a release appears to have been signed when the parties were mutually mistaken as to the extent of plaintiff's injuries, and the sum therein named being manifestly inadequate such instrument is not binding. *Smith v. Kansas City* ..... 518



**WORKMEN'S COMPENSATION ACT—CONTINUED:**

16. Compensation Act—Release Set Aside—Sufficiency of Evidence. Under the compensation act an action to set aside a release or other discharge of liability on the ground of fraud or mental incompetency may be joined with an action for compensation. *Vogler v. Bowersock*..... 456
17. Compensation Act—Settlement—Written Release—Inadequate Compensation. A voluntary settlement and release of a workman's claim against his employer for injuries sustained in the service of the latter, in the absence of fraud or mistake, is valid and binding. *Dotson v. Manufacturing Co.*..... 248
18. ——— A voluntary release and satisfaction of an injured workman's claim under the workmen's compensation act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer. *Id.*..... 248
19. Compensation Act—Validity of Release—Trial by Jury. In an action under the compensation act to enforce compensation, where the validity of a release or other discharge of liability is involved, either party may when the case is called for trial demand a trial of that issue by a jury. *Vogler v. Bowersock*.... 456
20. Compensation—Judgment Properly Modified. In a workman's compensation case the court ordered that if the defendants defaulted in the payment of \$4 a week the entire amount of compensation allowed should become due, and that execution should then issue therefor. Held, it was not error. *Lombard v. Planing Mill Co.*..... 780
21. Interstate Commerce—Injuries to Workman—Compensation Act Does Not Apply. The workmen's compensation act does not extend to the case of a workman engaged in interstate commerce who without his employer's fault is injured in the course of his employment. *Matney v. Railway Co.*..... 293

*Ex. J. M.*  
*12/2/18*









